cottonseed were produced in Tennessee in 1992; of that total, 3,963 bales of cotton and 1,530 metric tons of cottonseed were produced in those areas of Dyer and Lauderdale Counties affected by this interim rule. Thus, production in the affected areas of Dyer and Lauderdale Counties represents only about 0.5 percent of the cotton and 0.5 percent of the cottonseed produced in Tennessee in 1992.

The costs of treating unprocessed cotton and cottonseed to qualify them for interstate movement is approximately $1.90 per bale of cotton and $0.13 per bushel of cottonseed. For the 3 most recent marketing years (1990–1992), the average price per bale of cotton received by farmers was about $284; the average price per bushel of cottonseed received by farmers was about $1.60 (USDA, "Agricultural Statistics 1993," U.S. Government Printing Office, Washington, DC, 1993). Thus, the costs of treatment, seen as a percentage of value, range between 0.5 and 0.8 percent of the value of cotton and between 6 and 9 percent of the value of cottonseed. The majority of the cotton and cottonseed produced in the affected areas of Dyer and Lauderdale Counties is sold for processing, so the amount of cotton and cottonseed produced in the affected areas that will require treatment for interstate movement is expected to be small.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12778

This interim rule has been reviewed under Executive Order 12778, Civil Justice Reform. This interim rule: (1) Preempts all State and local laws and regulations that are inconsistent with it; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this interim rule.

Paperwork Reduction Act

This document contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, 7 CFR part 301 is amended as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C., 150bb, 150dd, 150ee, 150ff; 161, 162, and 164–167; 7 CFR 2.17, 2.51, and 371.2(c).

§ 301.52 [Amended]

2. In § 301.52, paragraph (a) is amended by adding "Tennessee," immediately after "Oklahoma,".

3. Section 301.52–2a is amended by adding an entry for Tennessee in alphabetical order to read as follows:

§ 301.52–2a Regulated areas; suppressive and generally infested areas.

* * * * *

Tennessee

(1) *Generally infested area.* None.

(2) *Suppressive area.*

Dyer County. That portion of the county lying within a 1.5-mile radius of the intersection of 36° 04″ latitude and 89° 35.5″ longitude; that portion of the county lying within a 1.5-mile radius of the intersection of 36° 02″ latitude and 89° 36″ longitude; and that portion of the county lying within a 1.5-mile radius of the intersection of 36° 05″ latitude and 89° 32″ longitude.

Lauderdale County. That portion of the county lying within a 1.5-mile radius of the intersection of 35° 54.5″ latitude and 89° 32″ longitude.

* * * * *

Done in Washington, DC, this 24th day of August 1994.

Terry L. Medley,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 94–21349 Filed 8–29–94; 8:45 am]

BILLING CODE 3410–34–P

*

7 CFR Part 319

[Docket No. 93–147–1]

Importation of Strawberries, Currants, and Palms

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are prohibiting the importation of strawberry plants from all foreign countries except Canada and Israel and prohibiting the import of currant plants from New Zealand. These actions are necessary to prevent the introduction of exotic strawberry and currant plant diseases into the United States. We are also prohibiting the importation into the United States of an additional species of the genus *Howea* (sentry palms), except from Lord Howe Island, New South Wales, Australia. This action is necessary to prevent the introduction into the United States of exotic palm pests which can afflict both species of *Howea*.

DATES: Interim rule effective August 30, 1994. Consideration will be given only to comments received on or before October 31, 1994.

ADDRESSES: Please send an original and three copies of your comments to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, room 804, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 93–147–1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Mr Peter Grosser or Mr. Frank E. Cooper, Senior Operations Officers, Port Operations, Plant Protection and Quarantine, APHIS, USDA, room 635, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–8295.

SUPPLEMENTARY INFORMATION:

Background

The Plant Quarantine Act (7 U.S.C. 151 *et seq.*) and the Federal Plant Pest Act (7 U.S.C. 150aa *et seq.*) authorize the Animal and Plant Health Inspection Service (APHIS) to prohibit or restrict the importation into the United States of any plants, roots, bulbs, seeds, or other plant products in order to prevent the introduction of plant pests into the United States.

Regulations promulgated under this authority, among others, include 7 CFR 319.37 through 319.37–14, "Subpart—Nursery Stock, Plants, Roots, Bulbs, Seeds, and Other Plant Products" (the regulations). These regulations govern the importation of living plants, plant parts, and seeds for or capable of propagation, and related articles. Other sections of 7 CFR 319 deal with articles such as cut flowers, or fruits and vegetables intended for consumption.

The regulations restrict or prohibit the importation of most nursery stock, plants, roots, bulbs, seeds, and other plant products. These articles are classified as either "prohibited articles" or "restricted articles."

A prohibited article is an article that the Deputy Administrator for Plant Protection and Quarantine (PPQ), APHIS, has determined cannot feasibly be inspected, treated, or handled to prevent it from introducing plant pests new to or not widely prevalent or distributed within and throughout the United States. Prohibited articles may not be imported into the United States, unless imported by the United States Department of Agriculture (USDA) for experimental or scientific purposes under specified safeguards.

A restricted article is an article that the Deputy Administrator for PPQ has determined can be inspected, treated, or handled to essentially eliminate the risk of its spreading plant pests if imported into the United States. Restricted articles may be imported into the United States if they are imported in compliance with restrictions that may include permit and phytosanitary certificate requirements, inspection, treatment, or postentry quarantine.

Before the effective date of this rule, under § 319.37–2 of the regulations, we prohibited the importation into the United States of strawberry plants (*Fragaria* spp.) from Australia, Austria, Czechoslovakia, France, Great Britain, Italy, Japan, Lebanon, The Netherlands, New Zealand, Northern Ireland, Republic of Ireland, Switzerland, and the countries formed from the former Union of Soviet Socialist Republics. Also, under the regulations, we allowed strawberry plants from countries other than those listed above to be imported into the United States as restricted articles.

This rule prohibits the importation into the United States of strawberry plants from any country other than Canada or Israel. This action is intended to prevent the introduction into the United States of exotic strains of a fungal pathogen, red stele disease, now widespread internationally. Red stele disease attacks strawberry plant roots, reducing fruit production and in some cases killing the plant. While some strains of red stele disease already occur in the United States, APHIS needs to prevent the introduction into the United States of exotic, and possibly more virulent, strains of the disease.

Also, we are requiring that phytosanitary certificates of inspection accompanying *Fragaria* spp. from Israel contain an additional declaration that the strawberries were found by the plant protection service of Israel to be free of red stele disease pathogen as well as any other damaging strawberry pathogens, based on visual inspection and indexing of the parent stock.

This rule also prohibits the importation into the United States of currant plants (*Ribes* spp.) from New Zealand. Before the effective date of this rule, the importation of currant plants was prohibited from Europe under § 319.37–2, but currant plants could be imported from other countries as restricted articles. This action is intended to prevent the introduction into the United States of an exotic currant disease, black currant reversion agent, which has recently spread to New Zealand. Black currant reversion agent, a viral pathogen spread by an insect vector, can significantly reduce fruit production.

Finally, this rule prohibits the importation of an additional species of the sentry palm (*Howea* spp.), except as a restricted article from Lord Howe Island, New South Wales, Australia. Currently, the import of *Howea belmoreana* from all countries is prohibited. However, import of the other species of the genus, *Howea forsterana*, is not prohibited. Because pathogens attack most species within a genus, we believe extending the import prohibition to both species of *Howea* is necessary.

We are allowing importation of both species of *Howea* from Lord Howe Island as restricted articles, however, because our review of the scientific literature did not reveal any indication of the presence of the lethal yellowing pathogen, the cadang-cadang pathogen, or any other damaging palm pests on Lord Howe Island. Additionally, New South Wales prohibits the importation of all palms and palm products onto the Lord Howe Island from all sources. We are requiring that phytosanitary certificates of inspection accompanying *Howea* spp. from Lord Howe Island contain both a declaration of origin (must be Lord Howe Island) and a declaration that the *Howea* were found by the plant protection service of New South Wales to be free of the lethal yellowing pathogen and the cadang-cadang pathogen, as well as any other damaging palm pathogens, based on visual inspection.

Miscellaneous

We are also changing in § 319.37–2 the spelling of the genus name of the sentry palm from *Howeia* to *Howea*. *Howea* is the more common spelling.

Immediate Action

The Administrator of the Animal and Plant Health Inspection Service has determined that there is good cause for publishing this interim rule without prior opportunity for public comment. Immediate action is necessary to prevent the introduction into the United States of exotic diseases affecting strawberries, currants, and sentry palms.

Because prior notice and other public procedures with respect to this action are impracticable and contrary to the public interest under these conditions, we find good cause under 5 U.S.C. 553 to make it effective upon publication in the **Federal Register**. We will consider comments that are received within 60 days of publication of this rule in the **Federal Register**. After the comment period closes, we will publish another document in the **Federal Register**. It will include a discussion of any comments we receive and any amendments we are making to the rule as a result of the comments.

Executive Order 12866 and Regulatory Flexibility Act

This interim rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for purposes of Executive Order 12866, and, therefore, has not been reviewed by the Office of Management and Budget.

This interim rule prohibits the import of strawberry plants from all foreign countries except Canada and Israel and prohibits the import of currant plants from New Zealand. Also, it prohibits the import into the United States of an additional species of the genus *Howea* (sentry palm), except from Lord Howe Island, New South Wales.

Currently, strawberry plants are imported into the United States only from Canada and Israel and only by one importer. Furthermore, this importer is not a small entity by Small Business Administration standards (having 100 or fewer employees). Therefore, prohibiting the import of strawberry plants from all foreign countries except Canada and Israel would not have a significant economic impact on small entities.

No currant plants are now imported into the United States from New Zealand. Prohibiting their import from New Zealand thus will not have a significant economic impact on small entities.

Finally, we were not able to obtain any information on the domestic production or import of either species of *Howea*; we believe this is because *Howea* is neither produced domestically

nor imported on a large scale. We anticipate, therefore, that prohibiting the import into the United States of both species of *Howea* from everywhere except Lord Howe Island, New South Wales, Australia, will not have a significant economic impact on small entities.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB), and there are no new requirements. The assigned OMB control number is 0579–0049.

List of Subjects in 7 CFR Part 319

Bees, Coffee, Cotton, Fruits, Honey, Imports, Incorporation by reference, Nursery Stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, 7 CFR part 319 is amended as follows:

PART 319—FOREIGN QUARANTINE NOTICES

1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 150dd, 150ee, 150ff, 151–167, 450; 21 U.S.C. 136 and 136a; 7 CFR 2.17, 2.51, and 371.2(c).

2. In the table in § 319.37–2, paragraph (a) is amended by revising the entries listed for *Fragaria* spp. (strawberry), *Howea belmoreana* (sentry palm), and *Ribes* spp. (currant, gooseberry) as follows:

§ 319.37–2 Prohibited articles.

(a) * * *

Prohibited article (includes seeds only if specifically mentioned)	Foreign places from which prohibited	Plant pests existing in the places named and capable of being transported with the prohibited article
* * * * *	* * *	* * *
Fragaria spp. (strawberry) not meeting the conditions for importation in § 319.37–5(h).	All except Canada	* * *
* * * * *	* * *	* * *
Howea supp. (sentry palm) not meeting the conditions in § 319.37–5(n)	* * *	* * *
* * * * *	* * *	* * *
Ribes supp. * * *	Europe and New Zealand	* * *
* * * * *	* * *	* * *

3. In § 319.37–5, paragraph (h) is revised and a new paragraph (n) is added to read as follows:

§ 319.37–5 Special foreign inspection and certification requirements.

* * * * *

(h) Any restricted article of *Fragaria* spp. (strawberry) from Israel is prohibited as specified in § 319.37–2(a) unless at the time of arrival at the port of first arrival in the United States the phytosanitary certificate accompanying the article of *Fragaria* spp. contains an additional declaration that stipulates that the parent stock was found free of red stele disease pathogen as well as any other damaging strawberry pathogens, based on visual inspection and indexing.

* * * * *

(n) Any restricted article of *Howea* spp. (sentry palm) from Lord Howe Island, New South Wales, Australia, is prohibited as specified in § 319.37–2(a) unless at the time of arrival at the port of first arrival in the United States the phytosanitary certificate accompanying the article of *Howea* spp. contains both a declaration of origin (must be Lord Howe Island) and a declaration stipulating that the *Howea* is free of the lethal yellowing pathogen and the cadang-cadang pathogen, as well as any other damaging palm pathogens, based on visual inspection.

(Approved by the Office of Management and Budget under control number 0579–0049)

Done in Washington, DC, this 24th day of August 1994.

Lonnie J. King,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 94–21348 Filed 8–29–94; 8:45 am]

BILLING CODE 3410–34–P

Agricultural Marketing Service

7 CFR Part 997

[Docket No. FV94–997–2IFR]

Clarifying and Updating Provisions Regulating the Quality of Domestically Produced Peanuts Handled by Persons Not Subject to the Peanut Marketing Agreement

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim rule clarifies that peanut handlers not signatory to Peanut Marketing Agreement No. 146 (Agreement) may store and shell certain Segregation 2 seed peanut lots with Segregation 1 seed peanut lots when such lots are produced under the auspices of a State agency which regulates or controls their production. This interim rule also updates information on the laboratories qualified

to perform aflatoxin testing of shelled peanuts. Allowing peanut handlers to commingle certain seed peanut lots reduces the space and costs needed to store seed peanuts. Updating laboratory information should assist handlers in moving peanuts to market. These changes are intended to bring the non-signatory handling requirements into conformity with those specified in the Agreement.

DATES: This interim final rule is effective August 30, 1994. Comments received by September 29, 1994 will be considered prior to finalization of the rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2523–S, Washington, D.C., 20090–6456, or Fax: (202) 720–5698. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Richard Lower, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2523–S, Washington, D.C. 20090–6456, telephone (202) 720–2020, facsimile (202) 720–5698.

SUPPLEMENTARY INFORMATION: This interim rule is issued pursuant to requirements of the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This interim final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. This action is not intended to have retroactive effect. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

There are approximately 45 handlers of peanuts who have not signed the Agreement who are subject to the regulations contained herein. Small agricultural service firms are defined by the Small Business Administration [13 CFR 121.601] as those whose annual receipts are less than $5,000,000. It is estimated that most of the handlers are small entities. Most producers doing business with these handlers are also small entities. Small agricultural producers have been defined as those having annual receipts of less than $500,000.

In 1993, the reported U.S. production, mostly covered under the Agreement, was approximately 3.33 billion pounds of peanuts, a 22 percent decrease from 1992 and the lowest level since 1983. The preliminary 1993 peanut crop value is $991.65 million, 77 percent of the 1992 crop value.

After aflatoxin was found in peanuts in the mid-1960's, the domestic peanut industry has sought to minimize aflatoxin contamination in peanuts and peanut products. Under authority of the Act, Peanut Marketing Agreement No. 146 and the Peanut Administrative Committee (Committee) were established by the Secretary in 1965. The Agreement was signed by a majority of domestic peanut handlers.

Public Law 101–220, enacted December 12, 1989, amended section 608(b) of the Act to require that all peanuts handled by persons who have not entered into the Agreement (non-signers) be subject to quality and inspection requirements to the same extent and manner as are required under the Agreement. It is estimated that 5 percent of the domestic peanut crop is marketed by non-signatory handlers and the remainder of the crop is handled by signatory handlers.

Under the non-signer provisions, no peanuts may be sold or otherwise disposed of for human consumption if the peanuts fail to meet the quality requirements of the Agreement. Regulations to implement Pub. L. 101–220 were issued and made effective on December 4, 1990 [55 FR 49980] and amended several times thereafter, and are published in 7 CFR Part 997. All such amendments were made to ensure that the non-signer handling requirements remain consistent with modifications to the handling requirements applied to signatory handlers under the Agreement. Violation of those regulations may result in a penalty in the form of an assessment by the Secretary equal to 140 percent of the support price for quota peanuts. The support price for quota peanuts is determined under section 108B of the Agricultural Act of 1949 (7 U.S.C. 1445c–3) for the crop year during which the violation occurs.

The intent of P.L. 101–220 and the objective of the Agreement is to insure that only wholesome peanuts of good quality enter edible market channels. Under the non-signer and Agreement regulatory provisions, farmers' stock peanuts with visible *Aspergillus flavus* mold (the principal source of aflatoxin) are required to be diverted to non-edible uses. Each lot of shelled peanuts and certain lots of inshell peanuts, destined for edible channels, must be officially sampled and chemically tested for aflatoxin by the Department or in other laboratories listed in the regulations. Inspection and chemical analysis programs are administered by the Department.

Under the non-signer provisions, the second sentence of paragraph (e) *Seed peanuts* prohibits the commingling of Segregation 2 seed lots with Segregation 1 peanut lots intended for human consumption. The difference between Segregation 1 and Segregation 2 lots is that Segregation 1 lots may contain no more than 2 percent damaged kernels and no more than 1 percent concealed damaged kernels, while Segregation 2 lots may contain more than 2 percent damaged kernels and 1 percent concealed damaged kernels. Both Segregation 1 lots and Segregation 2 lots must be free of visible *Aspergillus flavus*.

This interim rule clarifies the handling provisions in paragraph (e) of *§ 997.20 Incoming regulation* to allow Segregation 2 seed peanut lots containing up to 3 percent total damaged kernels to be stored, shelled and commingled with Segregation 1 seed peanut lots if both lots were produced under the auspices of a State peanut agency which regulates or controls the production of the lots being commingled.

The Committee meets in February or March each year and recommends to the Secretary such rules and regulations as may be necessary to keep the Agreement consistent with current industry practice. The Committee met on March 16, 1994, and unanimously recommended clarification of seed peanut handling regulations under the Agreement. Members of the Committee noted the impracticality of having separate storage bins for each of the various types and varieties of seed peanuts with up to 3 percent damage. It was noted that, if Segregation 2 seed lots with up to 3 percent damaged must be stored separate from Segregation 1 seed

lots, "foundation," "registered," and "certified" seed lots would have to be segregated into separate categories. This could increase the number of separate bins and space needed to store seed peanut lots. The current regulations for both signers and non-signers do not specifically address commingling Segregation 1 seed lots with Segregation 2 seed lots.

The Committee concluded that it is impracticable to require such Segregation 2 seed peanuts be stored and shelled separate from Segregation 1 seed peanuts. The Department has initiated rulemaking to implement such a clarification in handling requirements applied on signatory handlers.

This interim rule revises § 997.20(e) for non-signer seed peanuts and is intended to bring the non-signatory handling requirements into conformity with those specified in the Agreement. This rule clarifies handling requirements and will facilitate the movement of peanuts to market.

This rule will have no affect on the outgoing quality regulation of the non-signer provisions. The quality and handling requirements, as specified in § 997.30 *Outgoing regulations* applicable to non-signatory 1993–94 crop peanuts, continues to be effective for 1994–95 crop peanuts.

This interim rule also updates addresses and facsimile numbers, where applicable, of approved aflatoxin testing laboratories that perform chemical analyses required by the non-signatory handling regulations. This information is provided in paragraph (c)(5)(i) of § 997.30 *Outgoing regulations*. Non-signatory handlers may send peanut samples to any laboratory on the list, per instructions specified in paragraph (c) of the outgoing regulation. This rule also updates information in paragraph (c)(5)(ii) identifying the contact point of the USDA Science Division headquarter's office.

Based on available information, the Administrator of the AMS has determined that the issuance of this interim final rule will not have a significant economic impact on a substantial number of small entities.

After consideration of all available information, it is found that this action will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined, upon good cause, that it is impractical, unnecessary and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) This action merely clarifies restrictions on peanut handlers not subject to the Agreement; (2) the new crop year begins on July 1, 1994, and handlers need to know the regulations applicable to handling the 1994 and subsequent crop year peanuts as soon as possible; (3) this action brings the quality requirements under Part 997 into conformity with those under the Agreement, as required by the Act; and (4) this action provides a 30-day comment period, and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 997

Food grades and standards, Peanuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 997 is amended as follows:

PART 997—PROVISIONS REGULATING THE QUALITY OF DOMESTICALLY PRODUCED PEANUTS HANDLED BY PERSONS NOT SUBJECT TO THE PEANUT MARKETING AGREEMENT

1. The authority citation for 7 CFR Part 997 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. In § 997.20, paragraph (e) is amended by removing the second sentence and adding in its place the words: "Peanuts intended for seed use, produced under the auspices of a State agency which regulates or controls the production of seed peanuts, which do not meet Segregation 1 requirements shall be stored and shelled separate from peanuts intended for human consumption. However, Segregation 2 seed peanuts, produced under the auspices of the State agency, which contain up to 3 percent damaged kernels and are free from visible *Aspergillus flavus* may be stored and shelled with Segregation 1 seed peanuts which are also produced under the auspices of the State agency."

3. In § 997.30, paragraphs (c)(5) (i) and (ii) are revised to read as follows:

§ 997.30 Outgoing regulation.

* * * * *

(c) * * *

(5) * * *

(i) Laboratories at the following locations are approved to perform the chemical analyses required pursuant to this part. The sampling plan and procedures may be obtained from the Division.

USDA, AMS, Science Division, 1211 Schley Avenue, Albany, Georgia 31707, Tel: (912) 430–8490, Fax: (912) 430–8534

USDA, AMS, Science Division, c/o Golden Peanut Company, 200 W. Washington Street (Mail: P.O. Box 488), Ashburn, Georgia 31714, Tel: (912) 567–3703

USDA, AMS, Science Division, c/o Golden Peanut Company, 301 W. Pearl Street (Mail: P.O. Box 279), Aulander, North Carolina 27805, Tel: (919) 345–1661, ext. 156

USDA, AMS, Science Division, 610 North Main Street, Blakely, Georgia 31723, Tel: (912) 723–4570, Fax: (912) 723–7294

USDA, AMS, Science Division, c/o Golden Peanut Company, 42 North Ellis Street (Mail: P.O. Box 548), Camilla, Georgia 31730, Tel: (912) 336–0785, ext. 236

USDA, AMS, Science Division, c/o Stevens Industries, Cargill, Inc., 715 North Main Street (Mail: P.O. Box 272), Dawson, Georgia 31742, Tel: (912) 995–2111, ext. 257

USDA, AMS, Science Division, 107 S. Fourth Street, Madill, Oklahoma 73446, Tel: (405) 795–5615, Fax: (405) 795–3645

USDA, AMS, Science Division, 1411 Reeves Street (Mail: P.O. Box 1368), Dothan, Alabama 36302, Tel: (205) 794–5070, Fax: (205) 792–5185

USDA, AMS, Science Division, 308 Culloden Street (Mail: P.O. Box 1130), Suffolk, Virginia 23434, Tel: (804) 925–2286, Fax: (804) 925–2275

Pert Laboratories, P.O. Box 267, Peanut Drive, Edenton, North Carolina 27932, Tel: 919/482–4456

J. Leek Associates, P.O. Box 368, Colquitt, Georgia 27932, Tel: 912/758–3722

ABC Research, 3437 SW 24th Avenue, Gainesville, Florida 32607–4502, Tel: 904/372–0436

J. Leek Associates, 502 West Navarro Street, DeLeon, Texas 76444, Tel: 817/893–3640

Professional Service Ind., Inc., 3 Burwood Lane, San Antonio, Texas 78216, Tel: 210/349–5242

(ii) Handlers should contact the nearest laboratory from the list in paragraph (c)(5)(i) of this section to arrange to have samples chemically analyzed for aflatoxin content, or for further information concerning the chemical analyses required pursuant to this part handlers may contact: William J. Franks Jr., Director, Science Division, Agricultural Marketing Service, USDA, P.O. Box 96456, Room 3507–So, Washington, DC, 20090–6456, telephone (202) 720–5231, facsimile (202) 720–6496.

Dated: August 22, 1994.

Robert C. Keeney,

Director, Fruit and Vegetable Division.

[FR Doc. 94-21351 Filed 8-29-94; 8:45 am]

BILLING CODE 3410-02-P

7 CFR Part 1210

RIN 0581-AB21

[FV-93-706FR]

Watermelon Research and Promotion Plan: Amendments to the Referendum Procedures

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule will amend the rules of practice for referenda on the Watermelon Research and Promotion Plan to provide for referenda to be conducted by mail ballot, to allow watermelon importers to vote in the referendum, to change the eligibility criteria for producers to vote in referenda, and to include the 50 States and the District of Columbia.

EFFECTIVE DATE: August 30, 1994.

FOR FURTHER INFORMATION CONTACT: Sonia N. Jimenez, Research and Promotion Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2535-S, Washington, DC 20090-6456; telephone (202) 720-9916.

SUPPLEMENTARY INFORMATION: This final rule is issued under the Watermelon Research and Promotion Plan [7 CFR 1210], hereinafter referred as the Plan. The Plan is effective under the Watermelon Research and Promotion Act, as amended by the Watermelon Research and Promotion Improvement Act of 1993, [7 U.S.C. 4901-4916] hereinafter referred as the Act.

This rule has been determined to be not-significant for the purposes of Executive Order 12866 and therefore has not been reviewed by OMB.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. It is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under § 1650 of the Act, a person subject to the Plan may file a petition with the Secretary stating that the Plan or any provision of the Plan, or any obligation imposed in connection with the Plan, is not in accordance with law and requesting a modification of the Plan or an exemption from the Plan. The petitioner is afforded the opportunity for a hearing on the petition. After such hearing, the Secretary will make a ruling on the petition. The Act provides that the district courts of the United States in any district in which a person who is a petitioner resides or carries on business are vested with jurisdiction to review the Secretary's ruling on the petition, if a complaint for that purpose is filed within 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

There are approximately 750 watermelon handlers and 5,000 watermelon producers in the 50 States of the United States who would be affected by this rule. There are approximately 140 importers of watermelons. Small agricultural service firms are defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $5 million and small agricultural producers are defined as those having annual receipts of less than $500,000. The majority of watermelon handlers, producers, and importers may be classified as small entities.

U.S. production of watermelons is estimated through the use of U.S. shipment statistics. Shipments of U.S.-produced watermelons totaled about 1,895.6 million pounds in 1993, 7 percent less than in 1992. Imports of watermelons in 1993 totalled 343.5 million pounds, an increase of 12 percent. Therefore, domestic production is about six times as great as the volume of imports.

The changes to the procedures for conduct of referenda reflect amendments to the Act. The overall economic impact of these changes is not expected to be significant. The change from voting at Extension Service county offices to voting by mail ballot will not cause a change in the burden on voters. Allowing importers to vote in the referendum would add a burden for those importers who choose to vote. However, this burden is offset by the opportunity to vote on whether they are covered by the program. Increasing the exemption level from 5 acres to 10 acres and the change in producers' eligibility to vote will reduce the number of small producers eligible to vote in the program and hence the reduce burden on small producers. Further, voting in the referendum is voluntary. Including the 50 States and the District of Columbia will cause a burden on those producers and handlers in those regions but this burden is offset by the opportunity to participate in the referendum.

The research and promotion program is expected to continue to benefit producers, handlers, and importers subject to the Plan by expanding and maintaining new and existing markets. Accordingly, the Administrator of AMS has determined that this final rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 [40 U.S.C. chapter 35], the information collection requirements contained in the Plan have previously been approved by the Office of Management and Budget (OMB) and assigned OMB number 0581-0093. There will be a new reporting burden on importers but the burden has been already approved by the OMB and assigned OMB control number 0581-0093. This action adds no additional reporting burden. It has been estimated that it will take an average of 10 minutes for each producer, handler, and importer of watermelons to participate in the voluntary referendum balloting.

Background

Under the Plan, the National Watermelon Promotion Board (Board) administers a nationally coordinated program of research, development, advertising, and promotion designed to strengthen the watermelon's position in the market place and to establish, maintain, and expand markets for domestic watermelons. This program is financed by assessments on producers and handlers of watermelons. The Plan specifies that handlers are responsible for collecting and submitting both the producer and handler assessments to the Board, reporting their handling of watermelons, and maintaining records necessary to verify their reporting.

A proposed rule was published in the **Federal Register** on April 14, 1994 [59 FR 17739]. The rule published in April contained the proposed amendments to the Plan, rules and regulations, rules of practice for petitions, and referendum procedures. The Department has decided to separately make final the referendum procedures because the

changes to the referendum procedures must be in place in order to conduct the referendum in November 1994 on two of the amendments. Therefore, this action will put into effect the subpart containing the referendum procedures. The proposed amendments to the Plan, rules and regulations, and rules of practice for petitions are published separately in this issue of the **Federal Register**.

The deadline for comments on all of the proposed amendments published on April 14 was May 16, 1994. Twenty-one comments were received.

Three of the comments related to the referendum procedures. Three commentors stated that proof of voter eligibility should be required. They stated that this could be accomplished by requesting voters to provide their business identification number or social security number and/or sales receipts, acreage reports, or bill of lading that reflect their watermelon activity for 1993.

The Department agrees with requesting business identification number or social security number on the ballot as proof of voter eligibility. However, it is not necessary to modify the referendum rules in order to collect this information. This collection of information has been approved by OMB under OMB number 0581–0093 and does not add any burden on voters.

The amendments to the Act authorize an assessment on watermelons imported into the United States by importers and the addition of importer members to the Board if approved by watermelon producers, handlers, and importers in a referendum. Therefore, watermelon importers will also be eligible to vote in the referenda. In order to include importers in the referendum procedures, this rule will amend §§ 1210.200, 1210.201, 1210.202, 1210.203, and 1210.204 of the referendum procedures.

The Act increased the acreage for exempt producers from "less than 5 acres" to "less than 10 acres" of watermelons and changed the eligibility for producers to serve on the Board. The Act provides that a producer is eligible to serve on the Board as a representative of handlers (1) if a producer purchases watermelons from other producers in a combined total volume that is equal to 25 percent or more of the producer's own production or (2) if the combined total volume of watermelons handled by the producer from the producer's own production and purchases from other producer's production is more than 50 percent of the producer's own production. This provision clarifies the eligibility of producers and handlers to serve on the Board as representatives of their specific group and also applies to voter eligibility. In addition, the increase in the exemption level from "less than 5 acres" to "less than 10 acres" will determine producer's eligibility to vote because only producers of 10 acres or more will be eligible to vote in the referendum. Therefore, this rule will amend §§ 1210.201 and 1210.202.

The Act also increases applicability of the law from the 48 contiguous States to the 50 States and the District of Columbia. Therefore, since they will be covered by the Plan, voters in Alaska, Hawaii, and the District of Columbia are entitled to vote in the referendum. This rule will amend § 1210.201 accordingly.

The Act also provides that all future promulgation and amendment referenda do not have to be conducted at Extension Service county offices. This procedure proved to be expensive and difficult to administer. The Act will now allow referenda to be conducted by mail ballot which will reduce the costs involved in conducting referenda and facilitate a more timely tabulation of the results. In order to make this change, this rule will amend §§ 1210.203 and 1210.204.

Minor changes are made in this final rule for the purpose of clarity.

In addition, conforming changes will be made to § 1210.201.

After consideration of all relevant material presented with regard to the procedures to conduct a referendum, it is found that they effectuate the declared policy of the Act.

Pursuant to the provisions in 5 U.S.C. 553, it is found and determined that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because:

(1) A proposed rule with request for comments was published in the **Federal Register** and comments were received and they are addressed in this rule;

(2) It is necessary to have these procedures in place in order to conduct the referendum in November 1994; and

(3) No useful purpose will be served by a delay of the effective date.

List of Subjects in 7 CFR Part 1210

Agricultural promotion, Agricultural research, Market development, Reporting and recordkeeping requirements, Watermelons.

For the reasons set forth in the preamble, Part 1210, Chapter XI of Title 7 is amended as follows:

PART 1210—WATERMELON RESEARCH AND PROMOTION

1. The authority citation for 7 CFR Part 1210 continues to read as follows:

Authority: 7 U.S.C. 4901–4916.

Subpart—Procedure for the Conduct of Referenda in Connection with the Watermelon Research and Promotion Plan

2. Section 1210.200 is revised to read as follows:

§ 1210.200 General.

Referenda to determine whether producers, handlers, and importers favor issuance, suspension or termination of a Watermelon Research and Promotion Plan shall be conducted in accordance with this subpart.

3. Section 1210.201 is amended in paragraph (a) to add at the end of the paragraph ", as amended."; in paragraph (g) by removing the phrase "and handling" and adding in its place ", handling, and importing"; in paragraph (h) introductory text by removing the phrase "five" and adding in its place "10"; and adding new paragraphs (j) and (k) to read as follows:

§ 1210.201 Definitions.

* * * * *

(j) "Importer" means any person who imports watermelons into the United States as principal or as an agent, broker, or consignee for any person who produces watermelons outside the United States for sale in the United States.

(k) "United States" means each of the several States and the District of Columbia.

4. Section 1210.202 is revised to read as follows:

§ 1210.202 Voting.

(a) Each person who is a producer, handler, or importer as defined in this subpart, at the time of the referendum and who also was a producer, handler, or importer during the representative period, shall be entitled to only one vote in the Referendum: *Provided*, That each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce watermelons in which more than one of the parties is a producer, shall be entitled to one vote in the referendum covering only that producer's share of the ownership: *Provided further*, That the vote of a person who both produces and handles watermelons will be counted as a handler vote if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own

production and purchases from other producer's production is more than 50 percent of the producer's own production: *Provided further*, That the vote of a person who both imports and handles watermelons will be counted as an importer vote if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person.

(b) Proxy voting is not authorized, but an officer or employee of a corporate producer, handler, or importer, or an administrator, executor or trustee of a producing, handling, or importing entity may cast a ballot on behalf of such entity. Any individual so voting in a referendum shall certify that individual is an officer or employee of the producer, handler, or importer, or an administrator, executor, or trustee of a producing, handling, or importing entity and that that individual has the authority to take such action. Upon request of the referendum agent, the individual shall submit adequate evidence of such authority.

(c) Each producer, handler, or importer shall be entitled to cast only one ballot in the referendum.

5. Section 1210.203 is amended by revising paragraphs (b), (d)(1), (d)(2), and (d)(3) and adding a new paragraph (d)(4) to read as follows:

§ 1210.203 Instructions.

* * * * *

(b) Determine procedures for casting ballots.

* * * * *

(d) * * *

(1) Whether the person voting, or on whose behalf the vote is cast, is an eligible voter; and, if appropriate;

(2) The acreage and volume in pounds of watermelons produced by the voting producer during the representative period;

(3) The volume in pounds of watermelons handled by the voting handler during the representative period; and

(4) The volume in pounds of watermelons imported by the voting importer during the representative period.

* * * * *

6. Section 1210.204 is amended by revising the section heading and paragraph (a)(1); removing paragraph (b); redesignating paragraph (c) as paragraph (b); removing in new paragraph (b) the phrase "and handlers" and adding in its place ", handlers, and importers"; adding new paragraph (c), and revising paragraphs (d) and (e) to read as follows:

§ 1210.204 Agent.

* * * * *

(a) * * *

(1) Utilizing, without advertising expense, available media or public information sources (including, but not limited to, press and radio facilities serving the production area) to announce the dates of the referendum as well as the methods of voting, the eligibility requirements for voting, and other pertinent information regarding the referendum.

* * * * *

(c) Preside at a meeting where ballots are to be cast.

(d) Distribute ballots and the aforesaid texts to producers, handlers, and importers and receive any ballots which are cast.

(e) Record the name and address of persons receiving a ballot from, or casting a ballot with, said agent and inquire into the eligibility of such persons to vote in the referendum.

Dated: August 24, 1994.

Lon Hatamiya,

Administrator.

[FR Doc. 94–21318 Filed 8–29–94; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 506, 546, 552, 563, 571, 574 and 575

[No. 94–76]

RIN 1550–AA47

Mergers, Transfers of Assets and Liabilities, and Other Combinations Involving Savings Associations and Other Depository Institutions

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is amending its regulations governing mergers and combinations involving Federal savings associations to implement sections 501 and 502 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA). In general, the FDICIA amendments to the Federal Deposit Insurance Act (FDIA) and to the Home Owners' Loan Act (HOLA) ease previous restrictions on conversion transactions, and authorize Federally-chartered savings associations to acquire and be acquired by other depository institutions insured by the Federal Deposit Insurance Corporation (FDIC), subject to specified conditions.

The OTS is amending and further broadening its regulations to authorize combinations involving Federal stock savings associations and depository institutions that are not insured by the FDIC. The OTS also is amending its regulations to authorize Federal mutual savings associations to combine with other types of depository institutions provided that the transaction results in a mutual savings association.

In addition, the OTS is amending its regulations governing mergers and application procedures to: specify the types of transactions that require only an information filing with the OTS; specify the types of transactions that require OTS approval of a notice or application, and the related time frames, and further clarify and consolidate OTS regulations by incorporating the OTS's merger and transfer of assets policy statement into a single regulation.

EFFECTIVE DATE: September 29, 1994.

FOR FURTHER INFORMATION CONTACT: Kevin A. Corcoran, Assistant Chief Counsel, (202) 906–6962, Corporate and Securities Division; Therese L. Monahan, Project Manager, Supervisory Programs, (202) 906–5740; or Gary Masters, Financial Analyst, Corporate Activities Division, (202) 906–6729; Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background and Summary of Proposal

On August 18, 1992, the OTS issued notice of a proposal to amend the agency's regulations governing mergers and other combinations to permit mergers, consolidations and transfer of asset and assumption of liability transactions among savings associations and other FDIC-insured depository institutions in accordance with sections 501 and 502 of the FDICIA.[1] In addition, the OTS proposed changes to its regulations to allow Federal savings associations to convert directly to state and national banks (while retaining Savings Association Insurance Fund (SAIF) deposit insurance) in a so-called "Sasser conversion,"[2] and to permit any FDIC-insured depository institution that qualifies for Federal Home Loan Bank membership to convert to a Federal savings association charter. The proposal also specified the types of transactions that would require either prior notice or application to the OTS, and the time frames governing review of these filings. The proposal did not

[1] 57 FR 37112–37118 (August 18, 1992).

[2] Section 5(d)(2)(G) of the FDIA, 12 U.S.C. 1815(d)(2)(G).

include amendments to the merger regulations involving mutual savings associations. However, specific comments were requested as to whether mutual savings associations should be permitted to merge directly with banks without first undergoing a mutual-to stock conversion and what safeguards would be necessary for such transactions.

Finally, the OTS proposed to streamline and consolidate its regulations by, among other things, eliminating unnecessary portions of the OTS's merger and transfer of assets policy statement and incorporating the remainder in a better organized fashion into the revised section 563.22.

The OTS solicited public comments on all aspects of the proposal for a 30-day period. Upon consideration of all the comments received during the comment period, the OTS is adopting the proposal with some modifications, discussed below.

II. Summary of Comments

The OTS received 10 comment letters in response to the proposal, including four from savings banks, two from savings and loan holding companies, two from trade associations representing financial institutions, one from a law firm representing financial institutions and one from the Federal Housing Finance Board (FHFB). The OTS has carefully considered all of the comments received during the comment period. In addition, the OTS has reviewed the rulemakings of other Federal banking agencies on related subjects, and has sought, to the maximum extent possible, to adopt consistent provisions. The following is a discussion of the issues raised by the commenters.

A. Mandatory Federal Home Loan Bank Membership for Converting Savings Associations

As noted in the proposal, section 5(f) of the HOLA requires Federal Home Loan Bank (FHLBank) membership for all Federal savings associations, and FHLBank membership was consistently required of state-chartered savings associations by the Federal Savings and Loan Insurance Corporation as a condition of deposit insurance. In addition, after enactment of the FIRREA, the OTS required resulting banks in thrift-to-bank charter conversions and Oakar transactions [3] in which no savings association survived the transaction to continue to hold the former savings association's FHLBank stock in accordance with the requirements of the FHFB. Each commenter that addressed this issue objected to any regulation that would continue this requirement.

Since publication of the proposal, the FHFB advised the OTS that it will not require a savings association that has converted to a bank charter to retain membership in the FHLBank system, nor will the FHFB require a non-FHLBank system member that has acquired some or all of the assets of a savings association to become a member of the FHLBank system. In light of the FHFB's views on this issue, the OTS advised the FHFB on November 20, 1992 that the OTS was discontinuing its practice of imposing the condition that such institutions retain FHLBank stock. In addition, the OTS advised the FHFB that in prior cases where the FHLBank stock condition was imposed, the OTS would not object if a bank seeks to redeem its FHLBank stock and terminate its FHLBank membership. In March 1993, the OTS reiterated these positions in promulgating a final regulation that will remove, in 1995, the regulatory requirement that state-chartered savings associations have and maintain FHLBank membership.[4] Accordingly, the final rule does not require FHLBank membership of resulting institutions in the context of thrift-to-bank mergers and charter conversions.

B. Issues Regarding Mutual Savings Associations

Current OTS regulations generally provide that merger transactions involving Federal mutual savings associations must result in a mutual form of savings association, unless the mutual institution converts to a stock savings association as part of the transaction.[5] The proposal did not set forth any amendments to these regulations, but did solicit comment as to whether mutual savings associations should be permitted to merge with banks or other institutions other than in conjunction with a mutual-to-stock conversion, and if permitted, what safeguards should be established with respect to these transactions.

The comments addressing this issue unanimously opposed any regulation that would permit Federal mutual savings associations to be acquired by commercial banks or other stock-form institutions without a prior or simultaneous mutual-to-stock conversion by the mutual savings association. These commenters expressed the view that OTS regulations adequately protect the interests of mutual accountholders [6] and direct acquisition resulting in a stock institution may jeopardize those protections. They also noted that the FDICIA does not evidence any intent to change the current treatment of combinations involving mutual associations.

The OTS agrees with these comments and, accordingly, the final regulations continue to prohibit Federal mutual associations from combining with stock form institutions where the resulting institution is not a mutual savings association, except in the context of a mutual to stock conversion, and subject to other limited exceptions. Nevertheless, as more fully described below, the OTS has determined that Federal mutual savings associations may, in general, combine with stock form institutions where the Federal mutual association is the resulting association. The final rule includes revisions to 12 CFR 546.2 and 546.3 to effect these changes.

C. Review Period Under Section 10(s)(2) of the HOLA

The proposal solicited comment on processing procedures and time frames, including whether applications subject to section 10(s)(2) of the HOLA should be deemed "filed" when deemed complete under the OTS's general application processing procedures in 12 CFR Part 516. Under the proposal, the 60-day review time for these applications would not commence until an application is reviewed by the OTS and deemed complete under part 516.

Some commenters objected to the OTS's interpretation of the term "filed" in section 10(s) of the HOLA. These commenters suggested that the review time frames for applications under section 10(s)(2) should commence when an application is first submitted to the OTS, not when it is deemed complete. One commenter supported the proposal.

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[3] As used herein, an "Oakar" transaction refers to a combination between a savings association and a bank that is excepted from the moratorium on deposit insurance fund conversion set forth at section 5(d)(2)(A)(ii) of the FDIA by virtue of section 5(d)(3) of the FDIA. See 12 U.S.C. 1815(d)(2)(A)(ii) and 1815(d)(3).

[4] 58 FR 14510, 14513 (March 18, 1993). See 12 CFR 563.49.

[5] 12 CFR 552.13(c)(1)(ii).

[6] The OTS has recently issued an interim final regulation, with a request for comment, revising certain key provisions in its mutual to stock conversion regulations. The amendments generally prohibit merger conversions (*i.e.*, where a mutual savings association converts to stock form and simultaneously merges into another stock form depository institution) except in certain supervisory situations. In addition, OTS has proposed to add a "convenience and needs" test to its standards for approving mutual to stock conversions. See 59 FR 22725 (May 3, 1994) and 59 FR 22764 (May 3, 1994).

noting that any regulation providing different "filed" dates for applications under part 516 and section 10(s) of the HOLA would serve no purpose and would create confusion.

As explained in more detail in Section III.D. below, the final rule adopts the proposed application review time frames. To ensure uniform treatment of all transactional applications, the OTS believes applications subject to section 10(s)(2) of the HOLA should be processed, to the extent possible, consistently with all applications under part 516. Also, the processing time frames in the rule are consistent with the procedures established by the Office of the Comptroller of the Currency for conversion applications by national banks under section 502(b) of the FDICIA.[7]

D. Community Reinvestment Act Issues

Comments were solicited on whether the OTS should have the ability to suspend the processing time frames under section 10(s)(2) of the HOLA for applications challenged on Community Reinvestment Act (CRA)[8] grounds.

Two commenters opposed any regulation that would permit suspension of the review time frames for applications subject to section 10(s)(2) of the HOLA.[9] One of these commenters asserted that the OTS lacks the authority to review an applicant's CRA compliance record where a savings association acquires another insured depository institution in an Oakar transaction under section 5(d)(3) of the FDIA.

This commenter asserted that although section 5(d)(3) of the FDIA requires the OTS to consider the factors set forth in section 18(c) of the FDIA (the Bank Merger Act (BMA)) in acting upon an Oakar transaction, the BMA is not itself applicable to such transactions. Therefore, according to the commenter, an application to engage in an Oakar transaction is not an "application for a deposit facility" within the meaning of the CRA, and the CRA requirement that the OTS take an institution's CRA record into account in its evaluation of an application for a deposit facility[10] is not applicable.

We find the commenter's assertions to be unpersuasive. Section 5(d)(3) of the FDIA merely establishes an exception to the general moratorium on insurance fund "conversion transactions" set forth at section 5(d)(2)(A)(ii) of the FDIA. Section 5(d)(3) does not state that Oakar transactions are excepted from all otherwise applicable approval requirements, and the BMA itself includes no exception from its plain language with respect to Oakar transactions. Moreover, the authorization provided by section 10(s) of the HOLA is subject to section 5(d)(3) of the FDIA *and the BMA, and all other applicable laws.*

The OTS, after further consideration of its applications processing procedures, observes that the procedures in part 516 of the OTS's regulations are intended to ensure that an application will not be deemed complete until expiration of the public comment period and resolution of any protests or other significant issues raised during that period. Accordingly, any challenges to a transaction on CRA grounds would be resolved prior to the commencement of the processing time frames under section 10(s)(2) of the HOLA. The OTS has amended the publication procedures for applications under § 563.22(a) to ensure that the public comment period has concluded before the OTS is required to make a completeness determination regarding such applications.

E. Application Review Standards and Regulatory Streamlining

The OTS proposed to incorporate into revised § 563.22 the approval standards, definitional provisions and other provisions of the OTS's merger and transfer of assets policy statement found at 12 CFR 571.5. The proposal requested comment on whether any of the standards in § 571.5 should be streamlined, clarified or otherwise modified or deleted in connection with their incorporation into § 563.22.

One commenter stated that some of the review criteria in § 571.5 went beyond the standards applicable to transactions under sections 5(d)(3) of the FDIA and 10(s) of the HOLA, and therefore should not be considered by the OTS in reviewing applications under these statutes.

Section 571.5 set forth not only the review standards for transactions under sections 5(d)(3) and 18(c) of the FDIA and 10(s) of the HOLA, but also general safety and soundness considerations applicable to all transfer transactions and combinations involving savings associations. Thus, the OTS believes it is appropriate to retain these review criteria. However, certain of the detailed criteria addressed in § 571.5, for example those pertaining to retention of attorneys and other professionals, tie-in transactions, and fees paid in connection with transactions, are considered by OTS as part of the overall evaluation of the managerial and financial resources and future prospects of the savings associations involved in a combination or transfer transaction. The OTS believes that the detail of certain criteria is not necessary and that general standards are more appropriate for an evaluation of the safety and soundness of a given transaction. Accordingly, § 563.22(d) of the final rule has been revised to incorporate streamlined and consolidated review standards derived from § 571.5, and § 571.5 has been deleted.

F. Other Issues

One commenter requested that the OTS clarify whether section 10(s)(3) of the HOLA (and § 552.13(b)(1) as set forth in the proposal) precludes transfer or consolidation transactions where a resulting institution would own the shares of one or more constituent institutions.

In OTS's view, section 10(s)(3) of the HOLA does not prohibit a Federal savings association from acquiring the stock of another insured depository institution and holding the other depository institution as a subsidiary. Section 10(s) was designed to cure what had been viewed as a statutory impediment to mergers or other combinations between a savings association and other types of insured depository institutions.[11] Section 10(s) was not established to bar transactions that are permissible under other, existing authority. Moreover, neither the text of section 502 of FDICIA nor its legislative history indicate that Congress intended section 10(s)(3) to override any separate legal authority for such an acquisition.

Federal savings associations, therefore, may acquire the shares of another insured depository institution and hold the acquired entity as a subsidiary if the legal authority for the transaction derives from a source other than section 10(s) of the HOLA. Such legal authority may be found, for example, under the service corporation provisions of the HOLA, and the OTS

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[7] 12 U.S.C. 215c; *see* Comptroller of the Currency's Manual for Corporate Activities, Vol. 1, Policies and Procedures (January 1992).

[8] Housing and Community Development Act of 1977, 12 U.S.C. 2901–2907.

[9] Two other commenters stated that any processing suspension should be limited to one or two 30-day periods.

[10] 12 U.S.C. 2903.

[11] The primary impediment was section 5(d)(3) of the HOLA, which, in pertinent part, authorizes the OTS to provide for the merger of savings associations with other savings associations, but is silent as to whether savings associations could merge with other types of depository institutions. For many years, the OTS, and its predecessor, the Federal Home Loan Bank Board, viewed the lack of express authorization for cross-industry mergers as, in effect, a prohibition on such transactions.

service corporation and operating subsidiary regulations.[12]

Accordingly, the final regulations provide that a Federal savings association may "combine" with any depository institution (subject to compliance with applicable statutes and regulations and certain other provisions), and define the term "combination" as a "merger or consolidation with another depository institution, or an acquisition of all or substantially all of the assets or assumption of all or substantially all of the liabilities of a depository institution by another depository institution."

One commenter questioned the OTS's authority to require any filing from a savings association proposing to convert to a bank charter or merge or transfer all of its assets to a bank. This commenter also questioned the necessity of any filing with the OTS in view of the requirement under the BMA that the OTS be provided with a copy of the application filed with the regulatory agency of the resulting depository institution. The filing requirements in the regulations as adopted enable the OTS, consistent with its broad responsibilities under the HOLA and other statutes, to ensure safe and sound operation of savings associations, identify any pending or potential supervisory concerns or enforcement actions involving the savings associations that are parties to the transaction, and, at a minimum, advise the appropriate regulatory agency regarding these concerns. The procedures are not contrary to any of the provisions of section 5(d) of the FDIA, and, in fact, represent a significant simplification of long-standing OTS application and approval requirements, which have been upheld by the courts. *See Home Mortgage Bank* v. *Ryan*, 986 F.2d 372 (10th Cir. 1993).

One commenter suggested that the OTS shorten the review period for applications submitted by savings associations, where the association previously had sought expedited treatment, but the OTS had advised the association that it was not eligible for expedited treatment. Under the final rule, such applications will be processed under standard time frames regardless of prior filings. However, to the extent a previously filed notice provides the OTS with useful information regarding a proposed transaction, it is likely that the OTS will be able to act on a subsequent, properly filed application prior to expiration of the full 60-day review period.

[12] 12 U.S.C. 1464(c)(4)(B); 12 CFR 545.74 and 545.81.

This same commenter inquired how the OTS would treat applications filed under § 563.22 that are awaiting OTS action at the effective date of the amended regulation, and whether such applications would need to be re-filed in accordance with the procedures adopted in the final rule. The commenter also inquired about the treatment that would be accorded applications that were approved but not consummated prior to adoption of this rule.

Both pending applications and proposed transactions that are now solely within the scope of new § 563.22(b)(1) will be subject to the new procedures upon the effective date of the amendments. Other applications currently awaiting OTS action will continue to be subject to the standards and procedures in effect at the time the applications were filed. Previously approved transactions must be consummated in accordance with the terms and conditions set forth in the OTS's approval order.

Some commenters expressed confusion about the proposed application and notice procedures. Many of these concerns are addressed in technical and clarifying changes made throughout the final rule.

III. Summary of Revisions

As more fully discussed below, the final regulations implement section 502 of the FDICIA by authorizing Federal stock associations to combine with any FDIC-insured depository institution, and by authorizing Federal mutual associations to combine with any FDIC-insured depository institution, provided that a mutual association is the resulting institution. In addition, the final regulations authorize certain combinations involving Federal associations and depository institutions not insured by the FDIC. The final regulations specifically authorize Federal stock savings associations to convert to state or national banks, and permit any stock-form depository institution that is, or is eligible to become, a member of a Federal Home Loan Bank, to convert to a Federal stock savings association charter. Finally, the OTS is amending its regulations governing the procedures regarding applications to engage in the above-described actions, and has made various technical and conforming amendments.

A. Expansion of Permissible Combinations for Federal Stock Savings Associations

The final rule revises 12 CFR 552.13(c) to permit Federal stock savings associations to combine with any depository institution, upon compliance with appropriate application or notice requirements, described in Section III.D below. The rule also establishes standards for combinations, including standards that address compliance with the asset composition requirements of section 5(c) of the HOLA and the qualified thrift lender requirements of section 10(m) of the HOLA, when a thrift acquires a bank. In addition, the regulation modifies and adds definitions for terms used throughout amended sections 552.13 and 563.22 to implement the new provisions of the HOLA and the FDIA.

The final regulation differs from the proposal in certain respects. The term "acquire" has been changed to "combination," and expanded to include combinations involving depository institutions not insured by the FDIC. Also, the term "combination" has been clarified to include purchase and assumption transactions that involve all or substantially all of a depository institution's assets or liabilities, rather than transactions of a lesser scope, such as branch sale transactions. The definition of the term "combination" reflects the OTS's position that the definition of the term "acquire" at section 10(s)(3) does not preclude a Federal savings association from holding another insured depository institution as a subsidiary, pursuant to a separate source of authority to do so.

Section 10(s)(1) of the HOLA states that Federal savings associations may acquire or be acquired by any insured depository institution, subject to sections 5(d)(3) and 18(c) of the FDIA, and all other applicable laws. The OTS has concluded that the reference to section 5(d)(3) of the FDIA does not mean that section 5(d)(3) must be applicable in order for a combination transaction to be permissible. The grant of authority in section 10(s)(1) of the HOLA to Federal savings associations to acquire or be acquired by another insured depository institution simply requires that any Federal savings association that proposes such a transaction comply with all applicable laws. Section 10(s)(1) was not intended to withhold from Federal associations the authority to engage in transactions exempted from the FIRREA moratorium on conversion transactions under other provisions of the FDIA,[13] or in transactions that are not subject to the moratorium in the first place (for example, because the transaction

[13] See, e.g., Section 5(d)(2)(C) (ii) and (iii) of the FDIA, 12 U.S.C. 1815(d)(2)(C) (ii) and (iii).

involves two SAIF-insured savings associations, or occurs after expiration of the moratorium). The OTS has clarified the final regulation accordingly.

The final regulation expands the categories of depository institutions with which Federal stock associations have the power to merge from only FDIC-insured depository institutions to any depository institution. Federal stock associations have been authorized to acquire or be acquired by non-FDIC insured depository institutions in purchase and assumption transactions since 1985.[14] The OTS has concluded that continuing to require such transactions to be accomplished through purchase and assumption transactions, rather than through merger transactions elevates form over substance, and may impose unnecessary expenses and complications on Federal stock associations that propose to engage in transactions with uninsured depository institutions.

Where a Federal stock association proposes to merge with an uninsured depository institution, and the Federal stock association would survive the transaction, the Federal stock association would be required to seek approval from the FDIC under section 18(c)(1) of the FDIA, as well as from the OTS under the transfer of assets regulations at 12 CFR 563.22(c). If the Federal stock association is not the resulting institution, the association must obtain OTS approval under 12 CFR 563.22(c), and provide any required notices to depositors, and to the FDIC.

B. Combinations Involving Federal Mutual Associations

The OTS has retained the prohibition against Federal mutual associations combining with stock form institutions where the resulting institution is not a mutual savings association, except where the mutual savings association converts to the stock form of organization pursuant to 12 CFR Part 563b, and subject to other, limited, exceptions.[15]

The OTS notes, however, that the concerns regarding the protection of mutual accountholders' interests in the acquisitions of Federal mutual associations do not arise when the Federal mutual association is the acquiring/surviving entity. Accordingly, the OTS is amending 12 CFR 546.2, governing mergers involving Federal mutual associations, to permit Federal mutual associations to merge with FDIC-insured depository institutions, as well as non-FDIC insured depository institutions, where a mutual savings association is the resulting entity. This treatment parallels the treatment of Federal stock associations. These combinations also would be subject to the same statutory and regulatory approval standards as apply to stock form associations engaging in a comparable transaction, described above.

Section 546.2 has not previously addressed the ability of Federal mutual associations to combine with other institutions in purchase and assumption transactions. The OTS has amended § 546.2 to provide specific authority for Federal mutual associations to combine with other entities in purchase and assumption transactions, subject to the same limitations that apply in the case of merger transactions involving Federal mutual associations.

The OTS has made technical and conforming amendments to 12 CFR part 546 in order to implement these revisions to § 546.2.

C. Charter Conversions by and to Federal Savings Associations

The OTS is adding 12 CFR 552.2–7 to the Federal stock savings association regulations, which specifically permits Federal stock savings associations to convert to state or national banks in so-called "Sasser" conversions.[16] New § 552.2–7 provides that converting savings associations must comply with the procedures set forth in new § 563.22(h)(1) or (h)(2)(ii) of the amended merger regulation, which requires prior notification to or approval of the OTS in the manner described in Section III.D. below.

The OTS is amending 12 CFR 552.2–6 to permit, with prior OTS approval, any stock-form depository institution that is, or is eligible to become, a member of a Federal Home Loan Bank, to convert to a Federal stock savings association charter. The depository institution, at the time of the conversion, must have deposits insured by the FDIC. In addition, the depository institution, in accomplishing the conversion, must comply with all applicable statutes and regulations, including, without limitation, the insurance fund conversion moratorium provisions set forth at section 5(d) of the FDIA.

The OTS has broad legal authority with respect to Federal savings associations under section 5(a) of the HOLA, which authorizes the Director of the OTS, under such regulations as the Director may prescribe, to, *inter alia*, provide for the organization, incorporation, examination, operation, and regulation of Federal savings associations. Section 5(a) of the HOLA provides the OTS with plenary authority over Federal savings associations, and, as the Supreme Court has noted, it would be difficult for Congress to give a broader mandate.[17]

The OTS notes that section 5(i)(1) of the HOLA provides specific authorization for "[a]ny savings association which is, or is eligible to become, a member of a Federal home loan bank" to "convert into a Federal savings association," subject to such regulations as the Director may prescribe. Immediately prior to the enactment of FIRREA, section 5(i)(1) of the HOLA permitted any "institution" which is, or is eligible to become, a member of a Federal home loan bank to convert to a Federal savings and loan association or Federal savings bank, subject to the regulations of the FHLBB.

FIRREA revised the language of section 5(i)(1) of the HOLA from any "institution" which is, or is eligible to become, a member of a Federal home loan bank, to any "savings association" that met such criteria. However, the OTS's review of the legislative history of FIRREA has revealed no intent on the part of Congress in the FIRREA to limit the types of depository institutions that may convert to a Federal savings association charter. Instead, it appears that the change in the "institution" terminology in section 5(i)(1) of the HOLA was inadvertent, and occurred when the term "insured institution," occurring throughout the HOLA, was changed in FIRREA to "savings association." Accordingly, the use of the OTS's authority under section 5(a) of the HOLA to broaden the class of depository institutions that are eligible for a Federal charter is not inconsistent with the FIRREA amendments to section 5(i)(1) of the HOLA.

New section 552.2–6 enables commercial banks and other depository institutions to accomplish directly what they have previously been able to

[14] *See* 50 FR 16071 (April 24, 1985).

[15] The OTS's recent amendments to the conversion regulations generally prohibit merger conversion transactions except in certain supervisory situations. *See* 59 FR 22725, 22729–22730 (May 3, 1994).

[16] The OTS regulations for Federal mutual savings associations have not been amended to authorize specifically the conversion of Federal mutual savings associations to state mutual savings banks, because such conversions are specifically authorized under section 5(i)(3) of the HOLA. Federal mutual savings associations proposing to convert to state mutual savings banks are required to notify the OTS or obtain OTS approval as described in section III.D., below.

[17] *See Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 161 (1982) (scope of authority of the Federal Home Loan Bank Board, the predecessor agency to the OTS).

accomplish indirectly. For example, in many cases, a state bank or other depository institution may, under state law, convert to a state-chartered savings bank, or a state-chartered savings association, which may, consistent with state law and section 5(i) of the HOLA (or, in some cases, section 5(o) of the HOLA), convert to a Federal savings association or a Federal savings bank. Similarly, a commercial bank or other depository institution may cause the chartering of a Federal association, and then transfer its assets and liabilities to the savings association.

The OTS believes that federal statutes should be interpreted and applied in a manner consistent with their purpose. In so doing, the substance, not merely the form of a transaction, is key. It is clear that no federal statutory barrier exists to the ultimate accomplishment of conversions of depository institutions to Federal thrift charters, provided that all applicable chartering and insurance requirements are met. Thus, absent compelling reasons to the contrary, to read the HOLA as implicitly requiring a multi-step process to accomplish these types of charter conversions would impose unnecessary expenses and complications upon depository institutions that wish to operate as Federal savings associations.

The classes of depository institutions that are permitted to convert to a Federal stock association charter under § 552.2–6 is broader than set forth in the proposed version of the regulation, which addressed only conversions by FDIC-insured depository institutions. The OTS believes that there are no compelling legal or policy reasons why stock-form depository institutions not insured by the FDIC should not be permitted to convert directly to a Federal savings association.[18] However, these institutions must meet the requirements for Federal Home Loan Bank membership, receive FDIC insurance of accounts prior to consummation of the conversion, and otherwise comply with all applicable statutes and regulations.

Applications filed under revised § 552.2–6 must comply with § 552.2–1 and other sections in part 552 regarding establishment of a Federal thrift charter.

D. Application Processing

As noted, the FDIA requires prior OTS approval of combinations between savings associations and other types of FDIC-insured depository institutions where the acquiring, assuming, or resulting institution is a savings association. In such transactions, the OTS will continue to require an application under amended § 563.22(a).

Under previous regulations, any savings association that proposed to convert to a bank in a Sasser transaction or be acquired by a bank in an Oakar transaction was required to file a transfer of assets application with the OTS.[19] The OTS continues to believe that an application process requiring prior written approval is necessary in certain situations, discussed below. However, with respect to Oakar transactions and other combinations between a thrift and a bank in which no savings association survives, the OTS's experience has indicated that a notification requirement would be sufficient. The OTS will advise the appropriate Federal banking agency of any supervisory concerns, enforcement actions and other relevant information regarding the institution.

Any savings association that proposes to convert to a bank charter in a Sasser conversion must file a notification or application with the OTS, depending on whether the savings association meets the requirements for expedited treatment under § 516.3(a). Specifically, savings associations that qualify for expedited treatment under § 516.3(a)(1) will be eligible to use the notification procedure set forth at § 563.22(h)(1) in order to engage in a Sasser conversion. Savings associations that do not qualify for such treatment will be required to file an application in order to engage in a Sasser conversion. Such applications will be subject to the general application processing timeframes.[20] The OTS notes that this procedure represents a significant reduction in burden from the prior procedures, under which every savings association that proposed to undertake a Sasser conversion was required to file a detailed application.

In evaluating applications proposing Sasser conversions, the OTS will assess the applicable factors set forth in § 563.22(d)(1), and whether the conversion may have a negative effect on the safety and soundness of the association or present a risk to the appropriate deposit insurance fund.

Sections 563.22(b) and (c) have been amended and a new § 563.22(h) has been added to the regulations setting forth special requirements and procedures for transactions subject to §§ 563.22 (b) and (c).

Specifically, amended § 563.22(b)(1) of the final rule requires prior notification to the OTS in accordance with new § 563.22(h)(1) of Sasser conversions of savings associations that meet the criteria for expedited treatment under § 516.3(a), and combinations between savings associations and FDIC-insured depository institutions (such as Oakar transactions) where no savings association will survive consummation of the transaction. The notification must be submitted at least 30 days prior to the effective date of the conversion or combination, but not later than the date on which an application relating to the proposed transaction is filed with the primary regulator of the resulting association. The rule also provides that, upon request or on its own initiative, the OTS may shorten the 30-day prior notification period.

New § 563.22(h)(1) requires the submission of either a letter describing material information regarding the transaction or a copy of a filing submitted to the regulatory agency of the resulting institution that must approve the transaction. The rule does not require OTS approval or clearance of such transactions prior to their consummation.

Given the amendments to § 563.22(b), the OTS has determined that it is appropriate to revise its application requirements for voluntary dissolutions of Federal associations set forth at 12 CFR 546.4. Amended § 546.4 provides that Federal associations that combine with a bank in a purchase and assumption transaction will not be required to file a voluntary dissolution application where the transaction involves the transfer of all of the Federal association's assets and liabilities. The OTS has determined that requiring a voluntary dissolution application would have eliminated any streamlining arising from the notification process in those circumstances. The Federal stock association will still be required under § 552.13 to surrender its charter upon completion of the transaction.

Amended § 563.22(c) requires prior notice or application to the OTS in accordance with new § 563.22(h)(2) for the following categories of transactions:

[18] The OTS is not, at this time, adopting a corresponding regulation that would authorize mutual-form depository institutions to convert to Federal mutual savings associations. The OTS may, in the future, consider promulgating a regulation authorizing such conversions. The OTS notes, however, that mutual-form state chartered savings banks that are insured by the Bank Insurance Fund are authorized to convert to Federal mutual savings banks, pursuant to section 5(o) of the HOLA.

[19] 12 CFR 563.22(b) (1993).

[20] The proposal included a notification requirement for all savings associations undertaking a Sasser transaction. Based on additional experience, the OTS is requiring an application from savings associations that fail to qualify for expedited processing and propose to undertake a Sasser transaction, because such associations may, in certain cases, present compliance or safety and soundness concerns that may warrant denial or conditioning of the application.

(1) Purchases of assets by a savings association that do not require OTS approval under the BMA and § 563.22(a);

(2) Bulk sales of less than all or substantially all of the assets of a savings association;

(3) Transactions in which a savings association transfers less than all or substantially all of its deposit liabilities to a bank or other depository institution;

(4) Bulk assumptions or transfers of non-deposit liabilities by a savings association; and

(5) Combinations involving savings associations and depository institutions other than insured depository institutions.

The OTS believes that an abbreviated procedure is appropriate for these types of transactions, provided that the savings association is well capitalized, and otherwise qualifies for "expedited treatment" under part 516. Accordingly, under new § 563.22(h)(2)(i), an expedited notice procedure is available for all five of the foregoing categories of transactions where all constituent savings associations meet the conditions for "expedited treatment" under 12 CFR 516.3(a). Notices under this provision of the rule would be deemed approved automatically 30 days after receipt, unless the OTS determines that an application is required.[21]

Under new §§ 563.22(h)(2)(ii) and 563.22(h)(2)(iii), a standard application procedure must be followed where any constituent savings association does not meet the criteria for "expedited treatment" under § 516.3(a), or where a notice filed under § 563.22(h)(2)(i) is incomplete or otherwise does not satisfy the notice requirements. These applications will be subject to the "standard" review periods set forth in part 516, with certain exceptions. As with other applications, the OTS is required to notify an applicant within 30 calendar days after proper submission of an application whether it is "sufficient" or "complete," and what additional information is required, if any, in order to render the submission sufficient, or that the submission is materially deficient and will not be processed.[22] In addition, the 60-day period for review for an application under these provisions commences on the date the OTS determines the application to be sufficient.[23]

[21] As is the case with respect to any notice receiving expedited treatment under § 516.3(a), the OTS may impose appropriate conditions in connection with acceptance of a notice under new § 563.22(h)(2)(i).

[22] 12 CFR 516.2(c).

[23] 12 CFR 516.2(d).

Under part 516, the OTS may extend the application review period for an additional 30-day period upon notice to the applicant.[24] Part 516 also permits the OTS to extend the review period in cases involving a significant issue of law or policy or where a protest has been filed under the CRA.[25] However, consistent with new section 10(s)(2) of the HOLA, new § 563.22(d)(4) and (h)(2)(iii) of the rule specifically provide that the 60-day review period for an Oakar application may be extended for up to 30 days only if the OTS determines that the applicant has failed to furnish information requested by the OTS, or if the information furnished is substantially inaccurate.

E. Technical Amendments

The final rule amends the definitional provisions of §§ 552.13 and 563.22 of the regulations to reflect the expanded authority conferred by new section 10(s) of the HOLA. In addition, as noted above, the final rule makes additional technical and conforming changes throughout these sections to simplify and clarify the application and notice procedures applicable to all mergers and other combinations involving savings associations.

Regulatory Flexibility Act

Pursuant to Section 605(b) of the Regulatory Flexibility Act, it is certified that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a final Regulatory Flexibility Analysis is not required.

Executive Order 12866

The OTS has determined that this rule does not constitute a "significant regulatory action" for purposes of Executive Order 12866.

Paperwork Reduction Act

The collection of information contained in § 563.22(a) has been submitted to and approved by the Office of Management and Budget (OMB) under OMB Control No. 1550–0016 in accordance with the requirements of the Paperwork Reduction Act (PRA) (44 U.S.C. 3504(h)).

Estimated burden for OMB Control No. 1550–0016:
Estimated number of respondents: 90
Estimated number of annual responses per respondent: 1
Estimated number of hours per response: 36
Estimated total annual reporting burden: 3240

[24] 12 CFR 516.2(e).

[25] 12 CFR 516.2(f).

The collections of information contained in § 563.22 (b) and (c) have changed since being submitted to and approved by OMB, in connection with the proposal, under OMB Control No. 1550–0025 in accordance with the requirements of the PRA. Accordingly, the collections of information at § 563.22 (b) and (c) have been resubmitted and approved by OMB under 44 U.S.C. 3507.

Estimated burden for OMB Control No. 1550–0025:
Estimated number of respondents: 135
Estimated number of annual responses per respondent: 1
Estimated number of hours per response: 4.04
Estimated total annual reporting burden: 545

The collections of information are needed by OTS to determine whether proposed transactions regarding mergers and transfer of asset and liability transactions involving banks and thrifts comply with applicable state and Federal laws and OTS regulations and policies, and whether these transactions will have an adverse affect on the risk exposure of the Savings Association Insurance Fund.

Comments concerning the accuracy of these estimates and suggestions for reducing this burden should be directed to Office Management and Budget, Paperwork Reduction Project (1550), Washington, DC 20503.

List of Subjects

12 CFR Part 506

Reporting and recordkeeping requirements.

12 CFR Part 546

Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 552

Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 563

Accounting, Crime, Currency, Investments, Mortgages, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

12 CFR Part 571

Accounting, Conflicts of interest, Investments, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 574

Administrative practice and procedure, Holding companies, Reporting and recordkeeping

requirements, Savings associations, Securities.

12 CFR Part 575

Capital, Holding companies, Reporting and recordkeeping requirements, Savings associations, Securities.

Accordingly, the Director of the OTS hereby amends parts 506, 546, 552, 563, 571, 574, and 575, chapter V, title 12, Code of Federal Regulations, as set forth below:

Subchapter A—Organization and Procedures

PART 506—INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 506 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

2. Section 506.1 is amended by removing three entries from the table in paragraph (b) to read as follows:

§ 506.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) *Display.*

12 CFR part or section where identified and described	Current OMB control No.
. . . . .	.
Delete 516.1(b)	1550–0056
. . . . .	.
563.100	1550–0078
563.101	1550–0078
. . . . .	.

Subchapter C—Regulations for Federal Savings Associations

PART 546—MERGER, DISSOLUTION, REORGANIZATION AND CONVERSION

3. The authority citation for part 546 is revised to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 2901 *et seq.*

4. Section 546.1 is revised to read as follows:

§ 546.1 Definitions.

The terms used in §§ 546.2 and 546.3 shall have the same meaning as set forth in §§ 552.13(b) and 563.22(g) of this chapter.

5. Section 546.2 is revised to read as follows:

§ 546.2 Procedure; effective date.

(a) A Federal mutual savings association may combine with any depository institution, provided that:

(1) The combination is in compliance with, and receives all approvals required under, any applicable statutes and regulations;

(2) Any resulting Federal savings association meets the requirements for Federal Home Loan Bank membership and insurance of accounts;

(3) In the case of a combination with a bank that is a member of the Bank Insurance Fund, any resulting Federal savings association conforms to the requirements of sections 5(c) and 10(m) of the Home Owners' Loan Act under the standards set forth in section 5(c)(5) of the Home Owners' Loan Act, and in the case of a combination with any other depository institution, any resulting Federal savings association conforms within the time prescribed by the OTS, to the requirements of section 5(c) of the Home Owners' Loan Act; and

(4) The resulting institution shall be a mutually held savings association, unless:

(i) The transaction involves a supervisory merger;

(ii) The transaction is approved under part 563b of this chapter; or

(iii) The transaction involves a transfer in the context of a mutual holding company reorganization under section 10(o) of the Home Owners' Loan Act.

(b) Each Federal mutual savings association, by a two-thirds vote of its board of directors, shall approve a plan of combination evidenced by a combination agreement. The agreement shall state:

(1) That the combination shall not be effective unless and until the combination receives any necessary approval from the Office pursuant to § 563.22 (a) or (c), or in the case of a transaction requiring a notice pursuant to § 563.22(c), the notice has been filed, and the appropriate period of time has passed or the OTS has advised the parties that it will not disapprove the transaction;

(2) Which constituent institution is to be the resulting institution;

(3) The name of the resulting institution;

(4) The location of the home office and any other offices of the resulting institution;

(5) The terms and conditions of the combination and the method of effectuation;

(6) Any charter amendments, or the new charter in the combination;

(7) The basis upon which the resulting institution's savings accounts will be issued;

(8) If the Federal mutual savings association is the resulting institution, the number, names, residence addresses, and terms of directors;

(9) The effect upon and assumption of any liquidation account of a disappearing institution by the resulting institution; and

(10) Such other provisions, agreements, or understandings as relate to the combination.

(c) Prior written notification to, notice to, or prior written approval of, the Office pursuant to § 563.22 of this chapter is required for every combination. In the case of applications and notices pursuant to 563.22 (a) or (c), the Office shall apply the criteria set out in § 563.22 of this chapter and shall impose any conditions it deems necessary or appropriate to ensure compliance with those criteria and the requirements of this chapter.

(d) Where the resulting institution is a Federal mutual savings association, the Office may approve a temporary increase in the number of directors of the resulting institution provided that the association submits a plan for bringing the board of directors into compliance with the requirements of § 544.1 of this chapter within a reasonable period of time.

(e) Notwithstanding any other provision of this part, the Office may require that a plan of combination be submitted to the voting members of any of the mutual savings associations that are constituent institutions at a duly called meeting(s), and that the plan, to be effective, be approved by such voting members.

(f) A conservator or receiver for a Federal mutual savings association may combine the association with another insured depository institution without submitting the plan to the association's board of directors or members for their approval.

(g) If a plan of combination provides for a resulting Federal mutual savings association's name or location to be changed, its charter shall be amended accordingly. If the resulting institution is a Federal mutual savings association, the effective date of the combination shall be the date specified in the approval; if the resulting institution is not a Federal savings association, the effective date shall be that prescribed under applicable law. Approval of a merger automatically cancels the Federal charter of a Federal association that is a disappearing institution as of the effective date of merger, and the

association shall, on that date, surrender its charter to the Office.

6. Section 546.3 is revised to read as follows:

§ 546.3 Transfer of assets upon merger or consolidation.

On the effective date of a merger or consolidation in which the resulting institution is a Federal association, all assets and property of the disappearing institutions shall immediately, without any further act, become the property of the resulting institution to the same extent as they were the property of the disappearing institutions, and the resulting institution shall be a continuation of the entity which absorbed the disappearing institutions. All rights and obligations of the disappearing institutions shall remain unimpaired, and the resulting institution shall, on the effective date of the merger or consolidation, succeed to all those rights and obligations, subject to the Home Owners' Loan Act and other applicable statutes.

7. Section 546.4 is amended by adding a sentence to the end of the concluding text of the section to read as follows:

§ 546.4 Voluntary dissolution.

* * * * *

* * * A Federal savings association is not required to obtain approval under this section where the Federal savings association transfers all of its assets and liabilities to a bank in a transaction that is subject to § 563.22(b) of this chapter.

PART 552—INCORPORATION, ORGANIZATION, AND CONVERSION OF FEDERAL STOCK SAVINGS ASSOCIATIONS

8. The authority citation for part 552 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a.

9. Section 552.2–6 is revised to read as follows:

§ 552.2–6 Conversion from stock form depository institution to Federal stock association.

With the approval of the Office, any stock depository institution that is, or is eligible to become, a member of a Federal Home Loan Bank, may convert to a Federal stock association, provided that the depository institution, at the time of the conversion, has deposits insured by the Federal Deposit Insurance Corporation, and provided further, that the depository institution, in accomplishing the conversion, complies with all applicable statutes and regulations, including, without limitation, section 5(d) of the Federal Deposit Insurance Act. The resulting Federal stock association must conform within the time prescribed by the OTS to the requirements of section 5(c) of the Home Owners' Loan Act. For purposes of this section, the term "depository institution" shall have the meaning set forth at 12 CFR 552.13(b).

10. Section 552.2–7 is added to read as follows:

§ 552.2–7 Conversion to National banking association or State bank.

A Federal stock association may convert to a National banking association or a State bank after filing a notification or application, as appropriate, with the Office in accordance with the applicable provisions of § 563.22(b) of this chapter.

11. Section 552.13 is amended by revising paragraphs (a) through (f), (h)(1), (h)(2) introductory text, (h)(2)(iii), (h)(2)(iv), and (j) through (l); and by removing and reserving paragraph (g), to read as follows:

§ 552.13 Combinations involving Federal stock associations.

(a) *Scope and authority.* Federal stock associations may enter into combinations only in accordance with the provisions of this section, sections 5(d) and 18(c) of the Federal Deposit Insurance Act, sections 5(d)(3)(A) and 10(s) of the Home Owners' Loan Act, and § 563.22 of this chapter.

(b) *Definitions.* The following definitions apply to §§ 552.13 and 552.14 of this part:

(1) *Combination.* A merger or consolidation with another depository institution, or an acquisition of all or substantially all of the assets or assumption of all or substantially all of the liabilities of a depository institution by another depository institution. *Combine* means to be a constituent institution in a combination.

(2) *Consolidation.* Fusion of two or more depository institutions into a newly-created depository institution.

(3) *Constituent institution.* Resulting, disappearing, acquiring, or transferring depository institution in a combination.

(4) *Depository institution* means any commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank or a credit union, chartered in the United States and having its principal office located in the United States.

(5) *Disappearing institution.* A depository institution whose corporate existence does not continue after a combination.

(6) *Merger.* Uniting two or more depository institutions by the transfer of all property rights and franchises to the resulting depository institution, which retains its corporate identity.

(7) *Mutual savings association.* Any savings association organized in a form not requiring non-withdrawable stock under Federal or State law.

(8) *Resulting institution.* The depository institution whose corporate existence continues after a combination.

(9) *Savings association* has the same meaning as defined in § 561.43 of this chapter.

(10) *State.* Includes the District of Columbia, Commonwealth of Puerto Rico, and States, territories, and possessions of the United States.

(11) *Stock association.* Any savings association organized in a form requiring non-withdrawable stock.

(c) *Forms of combination.* A Federal stock association may combine with any depository institution, provided that:

(1) The combination is in compliance with, and receives all approvals required under, any applicable statutes and regulations;

(2) Any resulting Federal savings association meets the requirements for Federal Home Loan Bank membership and insurance of accounts;

(3) In the case of a combination with a bank that is a member of the Bank Insurance Fund, any resulting Federal savings association conforms to the requirements of sections 5(c) and 10(m) of the Home Owners' Loan Act under the standards set forth in section 5(c)(5) of the Home Owners' Loan Act, and in the case of a combination with any other depository institution, any resulting Federal savings association conforms within the time prescribed by the OTS to the requirements of section 5(c) of the Home Owners' Loan Act; and

(4) If any constituent savings association is a mutual savings association, the resulting institution shall be mutually held, unless:

(i) The transaction involves a supervisory merger;

(ii) The transaction is approved under part 563b of this chapter;

(iii) The transaction involves an interim Federal stock association or an interim State stock savings association; or

(iv) The transaction involves a transfer in the context of a mutual holding company reorganization under section 10(o) of the Home Owners' Loan Act.

(d) *Combinations.* Prior written notification to, notice to, or prior written approval of, the Office pursuant to § 563.22 of this chapter is required for every combination. In the case of

applications and notices pursuant to § 563.22 (a) or (c), the Office shall apply the criteria set out in § 563.22 of this chapter and shall impose any conditions it deems necessary or appropriate to ensure compliance with those criteria and the requirements of this chapter.

(e) *Approval of the board of directors.* Before filing a notice or application for any combination involving a Federal stock association, the combination shall be approved:

(1) By a two-thirds vote of the entire board of each constituent Federal savings association; and

(2) As required by other applicable Federal or state law, for other constituent institutions.

(f) *Combination agreement.* All terms, conditions, agreements or understandings, or other provisions with respect to a combination involving a Federal savings association shall be set forth fully in a written combination agreement. The combination agreement shall state:

(1) That the combination shall not be effective unless and until:

(i) The combination receives any necessary approval from the Office pursuant to § 563.22 (a) or (c);

(ii) In the case of a transaction requiring a notification pursuant to § 563.22(b), notification has been provided to the OTS; or

(iii) In the case of a transaction requiring a notice pursuant to § 563.22(c), the notice has been filed, and the appropriate period of time has passed or the OTS has advised the parties that it will not disapprove the transaction;

(2) Which constituent institution is to be the resulting institution;

(3) The name of the resulting institution;

(4) The location of the home office and any other offices of the resulting institution;

(5) The terms and conditions of the combination and the method of effectuation;

(6) Any charter amendments, or the new charter in the combination;

(7) The basis upon which the savings accounts of the resulting institution shall be issued;

(8) If a Federal association is the resulting institution, the number, names, residence addresses, and terms of directors;

(9) The effect upon and assumption of any liquidation account of a disappearing institution by the resulting institution; and

(10) Such other provisions, agreements, or understandings as relate to the combination.

(g) [Reserved]

(h) *Approval by stockholders*—(1) *General rule.* Except as otherwise provided in this section, an affirmative vote of two-thirds of the outstanding voting stock of any constituent Federal savings association shall be required for approval of the combination agreement. If any class of shares is entitled to vote as a class pursuant to § 552.4 of this part, an affirmative vote of a majority of the shares of each voting class and two-thirds of the total voting shares shall be required. The required vote shall be taken at a meeting of the savings association.

(2) *General exception.* Stockholders of the resulting Federal stock association need not authorize a combination agreement if:

* * * * *

(iii) Each share of stock outstanding immediately prior to the effective date of the combination is to be an identical outstanding share or a treasury share of the resulting Federal stock association after such effective date; and

(iv) Either:

(A) No shares of voting stock of the resulting Federal stock association and no securities convertible into such stock are to be issued or delivered under the plan of combination, or

(B) The authorized unissued shares or the treasury shares of voting stock of the resulting Federal stock association to be issued or delivered under the plan of combination, plus those initially issuable upon conversion of any securities to be issued or delivered under such plan, do not exceed 15% of the total shares of voting stock of such association outstanding immediately prior to the effective date of the combination.

* * * * *

(j) *Articles of combination.* (1) Following stockholder approval of any combination in which a Federal savings association is the resulting institution, articles of combination shall be executed in duplicate by each constituent institution, by its chief executive officer or executive vice president and by its secretary or an assistant secretary, and verified by one of the officers of each institution signing such articles, and shall set forth:

(i) The plan of combination;

(ii) The number of shares outstanding in each depository institution; and

(iii) The number of shares in each depository institution voted for and against such plan.

(2) Both sets of articles of combination shall be filed with the Office. If the Office determines that such articles conform to the requirements of this section, the Office shall endorse the articles and return one set to the resulting institution.

(k) *Effective date.* No combination under this section shall be effective until receipt of any approvals required by the Office. The effective date of a combination in which the resulting institution is a Federal stock association shall be the date of consummation of the transaction or such other later date specified on the endorsement of the articles of combination by the Office. If a disappearing institution combining under this section is a Federal stock association, its charter shall be deemed to be cancelled as of the effective date of the combination and such charter must be surrendered to the Office as soon as practicable after the effective date.

(l) *Mergers and consolidations: transfer of assets and liabilities to the resulting institution.* Upon the effective date of a merger or consolidation under this section, if the resulting institution is a Federal savings association, all assets and property (real, personal and mixed, tangible and intangible, choses in action, rights, and credits) then owned by each constituent institution or which would inure to any of them, shall, immediately by operation of law and without any conveyance, transfer, or further action, become the property of the resulting Federal savings association. The resulting Federal savings association shall be deemed to be a continuation of the entity of each constituent institution, the rights and obligations of which shall succeed to such rights and obligations and the duties and liabilities connected therewith, subject to the Home Owners' Loan Act and other applicable statutes.

Subchapter D—Regulations Applicable to All Savings Associations

PART 563—OPERATIONS

12. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1828, 3806; Pub. L. 102–242, sec. 306, 105 Stat. 2236, 2355 (1991).

13. Section 563.22 is amended by:

a. revising paragraphs (a) and (b);

b. redesignating paragraphs (c) through (e) as paragraphs (d) through (f), respectively;

c. adding a new paragraph (c);

d. revising newly designated paragraph (d);

e. removing the introductory text of newly designated paragraph (e) and paragraph (e)(1);

f. redesignating newly designated paragraph (e)(2) as paragraph (e)(1) and revising it;

g. and h. redesignating newly designated paragraphs (e)(3) and (e)(4) as paragraphs (e)(2) and (e)(3), respectively, and revising new paragraph (e)(2);

i. adding new paragraphs (e)(4) and (e)(5);

j. redesignating the introductory text of newly designated paragraph (f)(1) as the introductory text to paragraph (f) and revising it;

k. redesignating newly designated paragraphs (f)(1)(i) through (f)(1)(xi) as paragraphs (f)(1) through (f)(11), (f)(1)(xiv) and (f)(1)(xv) as (f)(12) and (f)(13), (f)(1)(xvii) and (f)(1)(xviii) as (f)(14) and (f)(15), respectively, removing paragraphs (f)(1)(xii), (f)(1)(xiii) and (f)(1)(xvi), and revising newly designated paragraphs (f)(1), (f)(9) and (f)(14);

l. revising paragraph (g); and

m. adding a new paragraph (h).

§ 563.22 Merger, consolidation, purchase or sale of assets, or assumption of liabilities.

(a) No savings association may, without application to and approval by the Office:

(1) Combine with any insured depository institution, if the acquiring or resulting institution is to be a savings association; or

(2) Assume liability to pay any deposit made in, any insured depository institution.

(b)(1) No savings association may, without notifying the Office, as provided in paragraph (h)(1) of this section:

(i) Combine with another insured depository institution where a savings association is not the resulting institution; or

(ii) In the case of a savings association that meets the conditions for expedited treatment under § 516.3(a) of this chapter, convert, directly or indirectly, to a national or state bank.

(2) No savings association that does not meet the conditions for expedited treatment under § 516.3(a) of this chapter may, directly or indirectly, convert to a national or state bank without prior application to and approval of the Office, as provided in paragraph (h)(2)(ii) of this section.

(c) No savings association may make any transfer (excluding transfers subject to paragraphs (a) or (b) of this section) without notice or application to the Office, as provided in paragraph (h)(2) of this section. For purposes of this paragraph, the term "transfer" means purchases or sales of assets or liabilities in bulk not made in the ordinary course of business including, but not limited to, transfers of assets or savings account liabilities, purchases of assets, and assumptions of deposit accounts or other liabilities, and combinations with a depository institution other than an insured depository institution.

(d)(1) In determining whether to confer approval for a transaction under paragraphs (a), (b)(2), or (c) of this section, the Office shall take into account the following:

(i) The capital level of any resulting savings association;

(ii) The financial and managerial resources of the constituent institutions;

(iii) The future prospects of the constituent institutions;

(iv) The convenience and needs of the communities to be served;

(v) The conformity of the transaction to applicable law, regulation, and supervisory policies;

(vi) Factors relating to the fairness of and disclosure concerning the transaction, including, but not limited to:

(A) *Equitable treatment.* The transaction should be equitable to all concerned—savings account holders, borrowers, creditors and stockholders (if any) of each savings association—giving proper recognition of and protection to their respective legal rights and interests. The transaction will be closely reviewed for fairness where the transaction does not appear to be the result of arms' length bargaining or, in the case of a stock savings association, where controlling stockholders are receiving different consideration from other stockholders. No finder's or similar fee should be paid to any officer, director, or controlling person of a savings association which is a party to the transaction.

(B) *Full disclosure.* The filing should make full disclosure of all written or oral agreements or understandings by which any person or company will receive, directly or indirectly, any money, property, service, release of pledges made, or other thing of value, whether tangible or intangible, in connection with the transaction.

(C) *Compensation to officers.* Compensation, including deferred compensation, to officers, directors and controlling persons of the disappearing savings association by the resulting institution or an affiliate thereof should not be in excess of a reasonable amount, and should be commensurate with their duties and responsibilities. The filing should fully justify the compensation to be paid to such persons. The transaction will be particularly scrutinized where any of such persons is to receive a material increase in compensation above that paid by the disappearing savings association prior to the commencement of negotiations regarding the proposed transaction. An increase in compensation in excess of the greater of 15% or $10,000 gives rise to presumptions of unreasonableness and sale of control. In the case of such an increase, evidence sufficient to rebut such presumptions should be submitted.

(D) *Advisory boards.* Advisory board members should be elected for a term not exceeding one year. No advisory board fees should be paid to salaried officers or employees of the resulting savings association. The filing should describe and justify the duties and responsibilities and any compensation paid to any advisory board of the resulting savings association that consists of officers, directors or controlling persons of the disappearing institution, particularly if the disappearing institution experienced significant supervisory problems prior to the transaction. No advisory board fees should exceed the director fees paid by the resulting savings association. Advisory board fees that are in excess of 115 percent of the director fees paid by the disappearing savings association prior to commencement of negotiations regarding the transaction give rise to presumptions of unreasonableness and sale of control unless sufficient evidence to rebut such presumptions is submitted. Rebuttal evidence is not required if:

(1) The advisory board fees do not exceed the fee that advisory board members of the resulting institution receive for each monthly meeting attended or $150, whichever is greater; or

(2) the advisory board fees do not exceed $100 per meeting attended for disappearing savings associations with assets greater than $10,000,000 or $50 per meeting attended for disappearing savings associations with assets of $10,000,000 or less, based on a schedule of 12 meetings per year.

(E) The accounting and tax treatment of the transaction; and

(F) Fees paid and professional services rendered in connection with the transaction.

(2) In conferring approval of a transaction under paragraph (a) of this section, the Office also will consider the competitive impact of the transaction, including whether:

(i) The transaction would result in a monopoly, or would be in furtherance of any monopoly or conspiracy to monopolize or to attempt to monopolize the savings association business in any part of the United States; or

(ii) The effect of the transaction on any section of the country may be

substantially to lessen competition, or tend to create a monopoly, or in any other manner would be in restraint of trade, unless the Office finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the communities to be served.

(3) Applications and notices filed under this section shall be upon forms prescribed by the Office.

(4) Applications filed under section 5(d)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1815(d)(3)) and paragraph (a) of this section shall be processed in accordance with the time frames set forth in § 516.2 of this chapter, provided that the period for review may be extended only if the Office determines that the applicant has failed to furnish all requested information or that the information submitted is substantially inaccurate, in which case the review period may be extended for up to 30 days.

(e)(1) Notice of any proposed transaction under paragraph (a) of this section shall, unless the Office finds that it must act immediately in order to prevent the probable default of one of the savings associations involved, be published—

(i) No earlier than three calendar days before and no later than the date of filing an application under paragraph (a) of this section, and thereafter on a weekly basis during the period allowed for furnishing reports under paragraph (e)(2) of this section;

(ii) In the business section of a newspaper printed in the English language in the community in which the home offices of the constituent institutions are located. If it is determined that the primary language of a significant number of adult residents of any community is a language other than English, the applicant shall publish the notification simultaneously in the appropriate language(s).

(2) Unless the Office determines that action must be taken immediately in order to prevent the probable default of one of the savings associations involved, the Office shall request reports from the Attorney General, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation on the competitive factors involved in the transaction. The reports shall be furnished within thirty calendar days of the date on which they are requested, or within ten calendar days of such date if the Office advised the Attorney General and the other three banking agencies that an emergency exists requiring expeditious action. The Office shall immediately notify the Attorney General of any approval of a transaction pursuant to this section.

* * * * *

(4) Applications filed pursuant to paragraph (a) of this section shall be subject to the protest and oral argument procedures set forth in §§ 543.2 (e) and (f), except that protests may be submitted at any time during the period provided for in paragraph (e)(2) of this section.

(5) Notice of a proposed account transfer and the option of retaining the account in the transferring savings association shall be furnished to an affected accountholder:

(i) By a savings association transferring account liabilities to an institution the accounts of which are not insured by the Savings Association Insurance Fund, the Bank Insurance Fund, or the National Credit Union Share Insurance Fund; and

(ii) By any mutual savings association transferring account liabilities to a stock form depository institution. The required notice shall allow affected accountholders at least 30 days to consider whether to retain their accounts in the transferring savings association.

(f) *Automatic approvals by the Office.* Applications filed pursuant to paragraph (a) of this section shall be deemed to be approved automatically by the Office 30 calendar days after the Office sends written notice to the applicant that the application is complete, unless:

(1) The acquiring savings association does not meet the criteria for expedited treatment under § 516.3(a)(1) of this chapter;

* * * * *

(9) The acquiring savings association has assets of $1 billion or more and proposes to acquire assets of $1 billion or more;

* * * * *

(14) The transaction is opposed by any constituent institution or contested by a competing acquiror.

(g) *Definitions.* (1) The terms used in this section shall have the same meaning as set forth in § 552.13(b) of this chapter.

(2) *Insured depository institution. Insured depository institution* has the same meaning as defined in section 3(c)(2) of the Federal Deposit Insurance Act.

(3) With regard to paragraph (f) of this section, the term *relevant geographic area* is used as a substitute for *relevant geographic market*, which means the area within which the competitive effects of a merger or other combination may be evaluated. The relevant geographic area shall be delineated as a county or similar political subdivision, an area smaller than a county, or an aggregation of counties within which the merging or combining insured depository institutions compete. In addition, the Office may consider commuting patterns, newspaper and other advertising activities, or other factors as the Office deems relevant.

(h) *Special requirements and procedures for transactions under paragraphs (b) and (c) of this section*—(1) *Certain transactions with no surviving savings association.* The Office must be notified of any transaction under paragraph (b)(1) of this section. Such notification must be submitted to the OTS at least 30 days prior to the effective date of the transaction, but not later than the date on which an application relating to the proposed transaction is filed with the primary regulator of the resulting institution; the Office may, upon request or on its own initiative, shorten the 30-day prior notification requirement. Notifications under this paragraph must demonstrate compliance with applicable stockholder or accountholder approval requirements. Where the savings association submitting the notification maintains a liquidation account established pursuant to part 563b of this chapter, the notification must state that the resulting institution will assume such liquidation account.

The notification may be in the form of either a letter describing the material features of the transaction or a copy of a filing made with another Federal or state regulatory agency seeking approval from that agency for the transaction under the Bank Merger Act or other applicable statute. If the action contemplated by the notification is not completed within one year after the Office's receipt of the notification, a new notification must be submitted to the Office.

(2) *Other transfer transactions*—(i) *Expedited treatment.* A notice in conformity with § 516.3(a)(2) of this chapter may be submitted to the Office for any transaction under paragraph (c) of this section, provided all constituent savings associations meet the conditions for expedited treatment under § 516.3(a) of this chapter. Notices submitted under this paragraph shall be deemed approved automatically by the Office 30 calendar days after receipt, unless the Office advises the applicant in writing prior to the expiration of such period that the proposed transaction may not be consummated without the Office's approval of an application under

paragraphs (h)(2)(ii) or (h)(2)(iii) of this section.

(ii) *Standard treatment.* An application in conformity with § 516.3(b)(2) of this chapter and paragraph (d) of this section must be submitted to and approved by the Office by each savings association participating in a transaction under paragraph (b)(2) or (c) of this section, where any constituent savings association does not meet the conditions for expedited treatment under § 516.3(a) of this chapter, except as provided in paragraph (h)(2)(iii) of this section. Applications under this paragraph shall be processed in accordance with the time frames set forth in § 516.2 of this chapter.

(iii) *Standard treatment for transactions under section 5(d)(3) of the Federal Deposit Insurance Act.* An application in conformity with § 516.3(b)(2) of this chapter and paragraph (d) of this section must be submitted to and approved by the Office by each savings association which will survive any transaction under both § 5(d)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1815(d)(3)) and paragraph (c) of this section, where any constituent savings association does not meet the conditions for expedited treatment under § 516.3(a) of this chapter. Applications under this paragraph shall be processed in accordance with the time frames set forth in § 516.2 of this chapter, provided that the period for review may be extended only if the Office determines that the applicant has failed to furnish all requested information or that the information submitted is substantially inaccurate, in which case the review period may be extended for up to 30 days.

PART 571—STATEMENTS OF POLICY

14. The authority citation for part 571 continues to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1462a, 1463, 1464.

§ 571.5 [Removed and Reserved]

15. Section 571.5 is removed and reserved.

PART 574—ACQUISITION OF CONTROL OF SAVINGS ASSOCIATIONS

16. The authority citation for part 574 continues to read as follows:

Authority: 12 U.S.C. 1467a, 1817, 1831i.

17. Section 574.7 is amended by revising the last sentence of paragraph (a)(1) and the last sentence of paragraph (b) to read as follows:

§ 574.7 Determination by the OTS.

(a) * * *

(1) * * * Acquisitions involving mergers with an interim association shall also be subject to §§ 546.2, 552.13, and 563.22 of this chapter.

* * * * *

(b) * * * Acquisitions involving mergers (including mergers with an interim association) shall also be subject to §§ 546.2, 552.13, and 563.22 of this chapter.

* * * * *

PART 575—MUTUAL SAVINGS AND LOAN HOLDING COMPANIES

18. The authority citation for part 575 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828.

19. Section 575.13 is amended by revising paragraph (c)(3)(i) to read as follows:

§ 575.13 Procedural requirements.

(c) * * *

(3) * * *

(i) Sections 563.22(e)(1), (e)(2), (e)(3), and (e)(4) of this subchapter shall apply to all mutual holding company reorganizations.

* * * * *

Dated: April 29, 1994.

By the Office of Thrift Supervision.

Jonathan L. Fiechter,

Acting Director.

[FR Doc. 94–21294 Filed 8–29–94; 8:45 am]

BILLING CODE 6720–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MT6–1–5485a and MT20–1–6355a; FRL–5053–7]

Approval and Promulgation of Air Quality Implementation Plans; Montana; State Implementation Plan for Libby PM_{10} Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA approves the State implementation plan (SIP) submitted by the State of Montana to achieve attainment of the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}). The SIP was submitted by Montana to satisfy certain federal requirements for an approvable nonattainment area PM_{10} SIP for Libby. The effect of EPA's final action is to make the Libby PM_{10} SIP, including the Lincoln County Air Pollution Control Program regulations, federally enforceable.

DATES: This final rule will be effective October 31, 1994, unless adverse comments are received by September 29, 1994. If the effective date is delayed, timely notice will be published in the **Federal Register.**

ADDRESSES: Comments should be addressed to Meredith A. Bond, 8ART–AP, Environmental Protection Agency, Region VIII, 999 18th Street, suite 500, Denver, Colorado 80202–2405. Copies of the State's submittal and other information are available for inspection during normal business hours at the following locations: Air Programs Branch, Environmental Protection Agency, Region VIII, 999 18th Street, suite 500, Denver, Colorado; and Montana Department of Health and Environmental Sciences, Air Quality Division, 836 Front Street, Helena, Montana; and USEPA Air & Radiation Docket Information Center, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Meredith Bond at (303)293–1764.

SUPPLEMENTARY INFORMATION:

I. Background

The Libby, Montana, area was designated nonattainment for PM_{10} and classified as moderate under sections 107(d)(4)(B) and 188(a) of the Clean Air Act, upon enactment of the Clean Air Act Amendments of 1990.[1] See 56 FR 56694 (November 6, 1991) and 40 CFR 81.327 (specifying designation for Libby). The air quality planning requirements for moderate PM_{10} nonattainment areas are set out in subparts 1 and 4 of title I of the Act.[2] The EPA has issued a "General Preamble" describing EPA's preliminary views on how EPA intends to review SIPs and SIP revisions submitted under title I of the Act, including those State submittals containing moderate PM_{10} nonattainment area SIP requirements (see generally 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28,

[1] The 1990 Amendments to the Clean Air Act made significant changes to the Act. See Public Law No. 101–549, 104 Stat. 2399. References herein are to the Clean Air Act, as amended ("the Act"). The Clean Air Act is codified, as amended, in the U.S. Code at 42 U.S.C. 7401, *et seq.*

[2] Subpart 1 contains provisions applicable to nonattainment areas generally and subpart 4 contains provisions specifically applicable to PM_{10} nonattainment areas. At times, subpart 1 and subpart 4 overlap or conflict. EPA has attempted to clarify the relationship among these provisions in the "General Preamble" and, as appropriate, in today's document and supporting information.

1992)). Because EPA is describing its interpretations here only in broad terms, the reader should refer to the General Preamble for a more detailed discussion of the interpretations of title I advanced in today's action and the supporting rationale.

Those States containing initial moderate PM_{10} nonattainment areas were required to submit, among other things, the following provisions by November 15, 1991:

1. Provisions to assure that reasonably available control measures (RACM) (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology (RACT)) shall be implemented no later than December 10, 1993;

2. Either a demonstration (including air quality modeling) that the plan will provide for attainment as expeditiously as practicable but no later than December 31, 1994, or a demonstration that attainment by that date is impracticable;

3. Quantitative milestones which are to be achieved every 3 years and which demonstrate reasonable further progress (RFP) toward attainment by December 31, 1994; and

4. Provisions to assure that the control requirements applicable to major stationary sources of PM_{10} also apply to major stationary sources of PM_{10} precursors, except where the Administrator determines that such sources do not contribute significantly to PM_{10} levels which exceed the NAAQS in the area. See sections 172(c), 188, and 189 of the Act.

Some provisions are due at a later date. States with initial moderate PM_{10} nonattainment areas were required to submit a permit program for the construction and operation of new and modified major stationary sources of PM_{10} by June 30, 1992 (see section 189(a)). Such States also were to submit contingency measures by November 15, 1993, that become effective without further action by the State or EPA, upon a determination by EPA that the area has failed to achieve RFP or to attain the PM_{10} NAAQS by the applicable statutory deadline. See section 172(c)(9) and 57 FR 13510–13512 and 57 FR 13543–13544.

II. This Action

EPA is approving the Libby PM_{10} SIP, which includes the Lincoln County Air Pollution Control Program, as revised by the State of Montana on March 19, 1993, and submitted by the Governor of Montana to EPA on May 24, 1993, with the exception of contingency measures. Final technical corrections to the SIP were sent to EPA with a letter dated June 3, 1994. This submittal replaced earlier submittals, detailed as follows:

The Libby PM_{10} SIP was originally adopted by the Montana Board of Health and Environmental Sciences (MBHES) on November 15, 1991, and submitted to EPA by the Governor on November 25, 1991. To address deficiencies identified by EPA, commitments were adopted by the State after a public hearing on December 21, 1992, and submitted to EPA on January 13, 1993, as additional tasks to be completed to correct the deficiencies in the Libby and statewide SIP. The commitments relevant to the moderate PM_{10} nonattainment area SIP requirements due November 15, 1991, were fulfilled through SIP revisions adopted by the MBHES on March 19, 1993, and submitted by the Governor of Montana to EPA on May 24, 1993. In his cover letter, the Governor said that this May 24, 1993, submittal should replace the documents submitted in November 1991. Final technical corrections to the SIP were sent to EPA in a letter dated June 3, 1994.

The May 24, 1993, submittal also included contingency measure provisions. In a May 27, 1994, letter from Douglas M. Skie (EPA) to Jeff Chaffee (Montana Air Quality Bureau, MAQB), EPA advised the State that additional language concerning triggering of the contingency measures would be needed in the local regulations. EPA will propose separate action on the contingency measures once the State has incorporated the necessary changes, and submitted the revised SIP element to EPA.[3]

The State has fulfilled all remaining commitments. EPA is preparing separate actions on State submissions which satisfy commitments relating to Montana's operating permit program, and to Montana's New Source Review and Prevention of Serious Deterioration regulations and PM_{10} emission test methods. These items do not impact the attainment or maintenance demonstrations, credited control strategies in the Libby PM_{10} SIP, or other federal Clean Air Act SIP requirements for the Libby moderate PM_{10} nonattainment area due to EPA on November 15, 1991. A more detailed discussion of these commitments can be found in the Technical Support Document (TSD) for this action.

Section 110(k) of the Act sets out provisions governing EPA's review of SIP submittals (see 57 FR 13565-66). In today's action, EPA is granting approval of those elements of the Libby PM_{10} plan that were due on November 15, 1991, and submitted by the State on May 24, 1993, with final technical corrections dated June 3, 1994. EPA believes that the Libby plan meets the applicable requirements of the Act.

A. Analysis of State Submission

1. Procedural Background

The Act requires States to observe certain procedural requirements in developing implementation plans and plan revisions for submission to EPA. Section 110(a)(2) of the Act provides that each implementation plan submitted by a State must be adopted after reasonable notice and public hearing.[4] Section 110(l) of the Act similarly provides that each revision to an implementation plan submitted by a State under the Act must be adopted by such State after reasonable notice and public hearing. EPA also must determine whether a submittal is complete and therefore warrants further EPA review and action (see section 110(k)(1) and 57 FR 13565). EPA's completeness criteria for SIP submittals are set out at 40 CFR part 51, appendix V. EPA attempts to make completeness determinations within 60 days of receiving a submission. However, a submittal is deemed complete by operation of law if a completeness determination is not made by EPA six months after receipt of the submission.

To entertain public comment on the implementation plan for Libby, the State of Montana, after providing adequate notice, held a public hearing on November 15, 1991, to address the local air pollution control program and the Libby SIP. Following the public hearing, the local air pollution control plan and the Libby PM_{10} SIP were adopted by the State. The Governor of Montana submitted the SIP to EPA on November 25, 1991. The SIP submittal was reviewed by EPA to determine completeness in accordance with the completeness criteria set out at 40 CFR part 51, appendix V. The submittal was found to be complete, and a letter dated April 29, 1992, was forwarded to the Governor indicating the completeness of the submittal and the next steps to be taken in the review process.

Due to EPA comments regarding PM_{10} SIPs for other Montana nonattainment areas, the State included commitments

[3] The State is working with the local governments to amend the Lincoln County Air Pollution Control Plan to address EPA's concerns with the contingency measure trigger language. The State expects to incorporate the changes into the Montana SIP and submit a SIP revision to EPA during the fall of 1994.

[4] Also Section 172(c)(7) of the Act requires that plan provisions for nonattainment areas meet the applicable provisions of Section 110(a)(2).

with the November 25, 1991, Libby submittal to address statewide deficiencies (New Source Review/ Prevention of Significant Deterioration regulations, test methods, and an operating permit program), along with Libby-specific commitments regarding revising the attainment and maintenance demonstrations to properly handle background concentrations and to correct wood-burning program calculations, clarifying that the state emergency episode plan applies in Libby, and adopting contingency measures. In an October 7, 1992, letter from Doug Skie, EPA to Jeff Chaffee, MAQB, EPA notified the State that its commitments would need to be taken through the public hearing process, which would delay EPA's approvability determination. The State held a public hearing on December 21, 1992, and resubmitted the commitments as an official Governor's submittal in a letter dated January 13, 1993.

On March 19, 1993, the State of Montana, after providing adequate notice, held a public hearing to entertain public comment on revisions to the Libby PM_{10} SIP to satisfy several of the Governor's commitments, as discussed above. Following the public hearing, the revisions to the local air pollution control plan and the Libby PM_{10} SIP were adopted by the State. The Governor of Montana submitted the revised SIP to EPA on May 24, 1993. This submittal was deemed to be complete six months later on November 24, 1993. The Acting Administrator of EPA Region VIII sent a letter to the Governor on January 4, 1994, documenting that the submittal was deemed to be complete, and that EPA did review the May 24, 1993, Libby PM_{10} SIP submittal and found that it met the completeness criteria set out at 40 CFR part 51, appendix V. The Governor's submittal letter stated that this new submittal should replace the November 25, 1991, SIP submittal.

Subsequently, the State has fulfilled all remaining Governor's commitments. EPA is preparing separate actions on submittals addressing the statewide commitments (New Source Review/ Prevention of Significant Deterioration regulations, test methods, and an operating permit program). A detailed description of the Libby commitments is contained in the TSD for this action.

In this final rule action, EPA is announcing its approval of the revised Montana PM_{10} SIP submittal for Libby, as dated May 24, 1993 with final technical corrections dated June 3, 1994, with the exception of the contingency measures (which EPA will address separately).

2. Accurate Emission Inventory

Section 172(c)(3) of the Act requires that nonattainment plan provisions include a comprehensive, accurate, current inventory of actual emissions from all sources of relevant pollutants in the nonattainment area. The emission inventory also should include a comprehensive, accurate, and current inventory of allowable emissions in the area. Because the submission of such inventories is a necessary adjunct to an area's attainment demonstration (or demonstration that the area cannot practicably attain), the emission inventories must be received with the submission (see 57 FR 13539).

Libby's base year emissions inventory was developed for October 31, 1987, through November 30, 1988. The results were as follows. Annually, area sources account for 70.8% of the PM_{10} emissions, with re-entrained road dust the largest contributor at 62.4%. Residential wood burning, another area source, accounts for 7.6% of the PM_{10} emissions in the Libby area. The Stimson Lumber Company[5] sawmill and plywood plant is the largest point source, contributing 29.2% of the Libby area emissions. Two-thirds of its contribution is attributable to fugitive dust.

The emission inventory shows that the emissions are seasonal, with re-entrained road dust the primary source in spring and summer. Industry is the most important source category in the fall and winter. However, fugitive dust accounts for a large portion of the industrial emissions: 56.6% in the summer, 48.2% in the fall, and 18.2% in the winter. Re-entrained road dust is the major area source during the spring (83.7%), summer (53.9%), and fall (41.7%), and residential wood combustion is the major area source in the winter (27.3%).

EPA is approving the emissions inventory because it is accurate and comprehensive and provides a sufficient basis for determining the adequacy of the attainment demonstration for this area consistent with the requirements of sections 172(c)(3) and 110(a)(2)(K) of the Act.[6] For further details see the TSD.

3. RACM (Including RACT)

As noted, the initial moderate PM_{10} nonattainment areas must submit provisions to assure that RACM (including RACT) are implemented no later than December 10, 1993 (see sections 172(c)(1) and 189(a)(1)(C)). The General Preamble contains a detailed discussion of EPA's interpretation of the RACM (including RACT) requirement (see 57 FR 13539–13545 and 13560–13561).

Five sources/source categories were identified as contributing to the PM_{10} nonattainment problem in Libby. The following table contains an outline of these sources/source categories, their control measures and associated emissions reduction credit, and effective dates.

Source/source category	Control measure	PM_{10} emissions reduction	Effective date
Re-entrained road dust	Lincoln County Road Dust Control Regulations.		03/01/93
	Regulation 3: Materials to be Used on Roads and Parking Lots.	38%	
	Regulation 4: Street Sweeping and Flushing	58%	
	Regulation 6: Limiting the Application of Sanding Material.	7%	
	Combined controls	460.7 tpy 38% (annual) or 48% (24-hr)	
Prescribed burning	Lincoln County Open Burning Regulation: Regulation 7.	(No credit taken)	03/01/93
Residential wood combustion	Lincoln County Solid Fuel Burning Regulation: Regulation 2.	53 tpy 31% (annual) or 1196 #/day 66% (24-hour).	03/01/93

[5] Formerly Champion International. The facility was sold and renamed Stimson Lumber Company in early 1994, after the State submitted this SIP revision for the Libby, MT, PM_{10} nonattainment area. All existing permits relating to the facility remain in effect.

[6] EPA issued guidance on PM–10 emissions inventories prior to the enactment of the Clean Air Act Amendments in the form of the 1987 *PM–10 SIP Development Guideline*. The guidance provided in this document appears to be consistent with the amended Act (see section 193 of the CAA).

Source/source category	Control measure	PM_{10} emissions reduction	Effective date
Industry	Stimson Lumber Company permit modification #2627–M.		07/25/91
	Boilers & Dryers	449 tpy, or 55%	
	Haul Road Fugitive Dust	220 tpy, or 70%	
Motor vehicle exhaust	Federal tailpipe standards	12.2% 1988–1994 time period or 1.0% 1995–1997 time period.	(1)

[1] Ongoing due to fleet turnover.

A more detailed discussion of the individual source contributions and their associated control measures (including available control technology) can be found in the TSD for this action. EPA has reviewed the State's documentation and concluded that it adequately justifies the control measures to be implemented. The implementation of Montana's PM_{10} nonattainment plan for Libby will result in the attainment of the PM_{10} NAAQS by December 31, 1994. By this action EPA is approving the Libby PM_{10} plan's control strategy as satisfying the RACM (including RACT) requirement.

4. Demonstration

As noted, the initial moderate PM_{10} nonattainment areas must submit a demonstration (including air quality modeling) showing that the plan will provide for attainment as expeditiously as practicable, but no later than December 31, 1994, or the State must show that attainment by December 31, 1994, is impracticable (see section 189(a)(1)(B) of the Act). Montana conducted an attainment demonstration using receptor modeling (CMB) and rollback modeling for Libby. The 24-hour PM_{10} NAAQS is 150 micrograms/cubic meter ($\mu g/m^3$), and the standard is attained when the expected number of days per calendar year with a 24-hour average concentration above 150 $\mu g/m^3$ is equal to or less than one (see 40 CFR 50.6). The annual PM_{10} NAAQS is 50 $\mu g/m^3$, and the standard is attained when the expected annual arithmetic mean concentration is less than or equal to 50 $\mu g/m^3$ (lid.)

The demonstration for Libby indicates that the 24-hour PM_{10} NAAQS will be attained by December 31, 1994, at 139.2 $\mu g/m^3$. The demonstration indicated that an annual concentration of 47.6 $\mu g/m^3$ will be achieved by 1995,[7] showing attainment of the annual PM_{10} NAAQS. The control strategies used to achieve these design concentrations are summarized in the section titled "RACM (including RACT)." For a more detailed description of the attainment demonstration and the control strategies used, see the TSD for this action.

5. PM_{10} Precursors

The control requirements that are applicable to major stationary sources of PM_{10} also apply to major stationary sources of PM_{10} precursors, unless EPA determines such sources do not contribute significantly to PM_{10} levels which exceed the NAAQS in that area (see section 189(e) of the Act). The General Preamble contains guidance addressing how EPA intends to implement section 189(e) (57 FR 13539–13540 and 13541–13542). An analysis of air quality and emissions data for the Libby nonattainment area indicates that exceedances of the NAAQS are attributable chiefly to direct particulate emissions from re-entrained road dust and residential wood burning (*i.e.*, area sources). Neither the emissions inventory nor the CMB analysis for Libby revealed any major stationary sources of PM_{10} precursors. Consequently, EPA has determined that major sources of precursors of PM_{10} do not contribute significantly to PM_{10} levels in excess of the NAAQS. The consequence of this finding is to exclude any such sources from the applicability of PM_{10} nonattainment area control requirements. Further discussion of the analyses and supporting rationale for EPA's finding are contained in the TSD accompanying this notice. Note that while EPA is making a general finding for this area, today's finding is based on the current character of the area including, for example, the existing mix of sources in the area. It is possible, therefore, that future growth could change the significance of precursors in the area. EPA intends to issue future guidance addressing the effect of such potential changes in the significance of precursor emissions in an area.

6. Quantitative Milestones and Reasonable Further Progress

The PM_{10} nonattainment area plan revisions demonstrating attainment must contain quantitative milestones which are to be achieved every 3 years until the area is redesignated attainment and which demonstrate RFP, as defined in section 171(1), toward attainment by December 31, 1994 (see section 189(c) of the Act). RFP is defined in section 171(l) as such annual incremental reductions in emissions of the relevant air pollutant as are required by Part D or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable NAAQS by the applicable date.

While section 189(c) plainly provides that quantitative milestones are to be achieved until an area is redesignated attainment, it is silent in indicating the starting point for counting the first 3-year period or how many milestones must be initially addressed. In the General Preamble, EPA addressed the statutory gap in the starting point for counting the 3-year milestones, indicating that it would begin from the due date for the applicable implementation plan revision containing the control measures for the area (i.e., November 15, 1991, for initial moderate PM_{10} nonattainment areas). See 57 FR 13539.

As to the number of milestones, EPA believes that at least two milestones must be initially addressed. Thus, submittals to address the SIP revisions due on November 15, 1991, for the initial moderate PM_{10} nonattainment areas must demonstrate that at least two milestones will be achieved (1st milestone: November 15, 1991, through November 15, 1994; 2nd milestone: November 15, 1994, through November 15, 1997).

For the initial PM_{10} nonattainment areas that demonstrate timely attainment, the emissions reduction progress made between the SIP submittal (due date of November 15, 1991) and the attainment date will satisfy the first quantitative milestone. See 57 FR 13539. For areas that demonstrate timely attainment of the PM_{10} NAAQS, the milestones beyond

[7] The Clean Air Act calls for attainment by December 31, 1994. Section 188(c)(1). EPA interprets the State's demonstration as providing for attainment by January 1, 1995. EPA is proposing to approve the State's demonstration on the basis of the de minimis differential between the two dates. The State should promptly inform EPA if EPA has in any manner misinterpreted the date by which the State has demonstrated attainment in the Libby nonattainment area.

the attainment achievement date should, at a minimum, provide for continued maintenance of the standards.[8]

As indicated previously, the SIP for the Libby nonattainment area demonstrates attainment of the PM_{10} NAAQS by December 31, 1994. The SIP also demonstrates that the PM_{10} NAAQS will be maintained in future years by predicting a 24-hour design concentration of 137.1 $\mu g/m^3$ and an annual design concentration of 46.0 $\mu g/m^3$ for the year 1998. Therefore, EPA is approving the submittal as meeting the quantitative milestone requirement currently due.

The assurance that milestones and reasonable further progress will be achieved is based upon the State adopting and implementing the particular control measures contained in the SIP which are addressed in Section II.A.3, "RACM (including RACT)," of this document.

Finally, once a milestone has passed, the State will have to demonstrate that the milestone was, in fact, achieved for the Libby area as provided in section 189(c)(2) of the Act. The State of Montana's PM_{10} SIP indicates that the Montana Department of Health and Environmental Sciences (MDHES) and the Lincoln County Health Department (LCHD) will submit to EPA a milestone report consistent with federal guidelines by December 31, 1994.

All exceedances of the PM_{10} standard will be evaluated and a determination made as to the source of the exceedance. Changes in the air quality program to prevent further exceedances and a timetable for implementation will be developed. Any other EPA requirements for RFP reports will be incorporated as necessary.

7. Enforceability Issues

All measures and other elements in the SIP must be enforceable by the State and EPA (see sections 172(c)(6) and 110(a)(2)(A) of the Act and 57 FR 13556). The EPA criteria addressing the enforceability of SIPs and SIP revisions were stated in a September 23, 1987, memorandum (with attachments) from J. Craig Potter, Assistant Administrator for Air and Radiation, *et al.* (see 57 FR 13541). Nonattainment area plan provisions also must contain a program to provide for enforcement of control measures and other elements in the SIP (see section 110(a)(2)(C) of the Act).

The specific control measures contained in the SIP are addressed above in section II.A.3, "RACM (including RACT)." The Lincoln County air pollution control ordinances, as included in the SIP, are legally enforceable by LCHD. There are penalties for noncompliance with the mandatory solid fuel burning device regulation that are $25 for the third and subsequent violations. There are also penalties for violation of any provision of the open burning regulation that are: a fine not less than $10 and not more than $200 for each offense, except for burning hazardous wastes (as defined by 40 CFR part 261), which carries a penalty of a fine not to exceed $10,000 for each offense.

The Lincoln County Air Pollution Control Program and the associated local regulations are also enforceable by the MDHES, if the LCHD fails to administer the program. Since the program has been approved by the MBHES in accordance with section 75–2–301 of the Montana Clean Air Act and effectuated by a MBHES order, and since the MDHES can enforce MBHES orders, the MDHES has independent enforcement powers. Enforcement provisions are found in the Clean Air Act of Montana, sections 75–2–401–429, Montana Code Annotated.

The emission limits for the Stimson Lumber Company facility are enforceable by the MDHES through air quality permit #2627–M with a final modification date of July 25, 1991. Section 75–2–401 of the Montana Clean Air Act allows the MDHES to seek civil penalties for a violation of a permit limitation. Administrative Rules of Montana (ARM) 16.8.1112 allows the MDHES to revoke a permit for a violation of a permit limitation. These regulations are contained in the ARM 16.8.101 through 16.8.1602 and violations of these rules are punishable by civil penalties in an amount up to $10,000 per day and criminal penalties in an amount up to $1,000 per day.

If a State relies on a local government for the implementation of any plan provision, then, according to section 110(a)(2)(E)(iii) of the Act, the State must provide necessary assurances that the State has responsibility for ensuring adequate implementation of such plan provision. A State would have responsibility to ensure adequate implementation when, for example, the State has the authority and resources to implement the provision, and the local entity has failed to do so.

The Lincoln County Air Pollution Control Program was established in accordance with the requirements of section 75–2–301 of the Montana Clean Air Act, as amended (1991). A stipulation between the MDHES, the Lincoln County Commission and the Libby City Council was signed on March 18, 1993, to delineate responsibilities and authorities between the MDHES and the local authorities. On March 19, 1993, the MBHES held a public hearing and (a) approved the PM_{10} emission control plan for the Libby PM_{10} nonattainment area, and (b) incorporated the Lincoln County local air pollution control program and the PM_{10} emission control plan for the Libby area into the Montana SIP, and (c) issued a board order effectuating the program. The ordinances, stipulation, and board order were submitted to EPA with the Libby PM_{10} SIP.

The State also submitted a State Assistant Attorney General's opinion interpreting the authority of the MDHES to enforce any state and local air quality provisions if a local air quality program fails to do so. In practice, the MBHES issues a board order when it approves a local program or amendments to a program. Since the Montana Clean Air Act authorizes the MDHES to enforce board orders issued by the MBHES, the MDHES has the authority to assume jurisdiction over, and implement, a local program so approved. However, the Montana Clean Air Act also requires a hearing before the MBHES before such an assumption of jurisdiction and authority can be made.

The Lincoln County ordinances are in effect now, as is the State's permit modification for Stimson Lumber Company. The State of Montana has a program that will ensure that the measures contained in the Libby PM_{10} SIP are adequately enforced. EPA believes that the State's and Libby's existing air enforcement program will be adequate. The TSD for this action contains further information on enforceability requirements, responsibilities, and personnel and funding intended to support effective implementation of the control measures.

8. Contingency Measures

As provided in section 172(c)(9) of the Act, all moderate nonattainment area SIPs that demonstrate attainment must include contingency measures. See generally 57 FR 13510–13512 and 57 FR 13543–13544. These measures were required to be submitted by November 15, 1993, for the initial moderate

[8] Section 189(c) provides that quantitative milestones are to be achieved "until the area is redesignated attainment." However, this endpoint for quantitative milestones is speculative because redesignation of an area as attainment is contingent upon several factors and future events. Therefore, EPA believes it is reasonable for States to initially address at least the first two milestones. Addressing two milestones will ensure that the State continues to maintain the NAAQS beyond the attainment date for at least some period during which an area could be redesignated attainment. However, in all instances, additional milestones must be addressed if an area is not redesignated attainment.

nonattainment areas. Contingency measures should consist of other available measures that are not part of the area's control strategy. These measures must take effect without further action by the State or EPA, upon EPA's determination that the area has failed to make RFP or attain the PM_{10} NAAQS by the applicable statutory deadline.

The Libby nonattainment area SIP contains contingency measures that address re-entrained road dust (use of liquid de-icer and expansion of sanding and sweeping area to Air Pollution Control District boundaries) and residential wood combustion (prohibiting burning except under specified permits for the entire period between October 1 and March 31 each year). In a May 27, 1994, letter from Doug Skie, EPA, to Jeff Chaffee, MAQB, EPA advised the State that additional language was needed in the triggering mechanism for the contingency measures. The State is working with the local governments and health department to adopt the necessary changes. EPA will take separate action on the Libby PM_{10} contingency measures. See the TSD for this action for a more detailed discussion of the contingency measure deficiencies.

III. Final Action

EPA is approving the PM_{10} SIP submitted to EPA on May 24, 1993, with final technical corrections dated June 3, 1994, for the Libby, Montana nonattainment area, with the exception of the contingency measures. Among other things, the State of Montana has demonstrated that the Libby moderate PM_{10} nonattainment area will attain the PM_{10} NAAQS by December 31, 1994. EPA is also approving the Lincoln County Air Pollution Control Program, which was included in the Libby SIP submittal.

Because EPA considers this action noncontroversial and anticipates no adverse comments, this final approval is made without prior proposal. However, in a separate document in this **Federal Register** publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective October 31, 1994 unless, by September 29, 1994, adverse or critical comments are received.

If EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective October 31, 1994.

As noted, additional submittals for the initial moderate PM_{10} nonattainment areas (*i.e.*, nonattainment new source review program requirements) are due independent of the SIP requirements addressed in this action. EPA will determine the adequacy of any such submittal as appropriate.

Nothing in this action should be construed as permitting, allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to any SIP shall be considered separately in light of specific technical, economic, and environmental factors, and in relation to relevant statutory and regulatory requirements.

The OMB has exempted this action from review under Executive Order 12866.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, I certify that it does not have a significant impact on a substantial number of small entities affected. Moreover, due to the nature of the Federal-state relationship under the Clean Air Act, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of a state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (1976); 42 U.S.C. 7410 (a)(2).

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 31, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See Act, section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: August 3, 1994.

Jack McGraw,

Acting Regional Administrator.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart BB—Montana

2. Section 52.1370 is amended by adding paragraph (c)(33) to read as follows:

§ 52.1370 Identification of plan.

* * * * *

(c) * * *

(33) The Governor of Montana submitted a portion of the requirements for the moderate nonattainment area PM_{10} State Implementation Plan (SIP) for Libby, Montana with letters dated November 25, 1991 and May 24, 1993, with technical corrections dated June 3, 1994. The submittals were to satisfy those moderate PM_{10} nonattainment area SIP requirements due for Libby on November 15, 1991.

(i) Incorporation by reference.

(A) Stipulation signed October 7, 1991 between the Montana Department of Health and Environmental Sciences (MDHES), the County of Lincoln and the City of Libby, which delineates responsibilities and authorities between the MDHES, Lincoln County and Libby.

(B) Board order issued on November 15, 1991 by the Montana Board of Health and Environmental Sciences approving the Lincoln County Air Pollution Control Program.

(C) Stipulation signed March 18, 1993 between the Montana Department of Health and Environmental Sciences, the County of Lincoln and the City of Libby, seeking approval of amendments to the local air pollution control program.

(D) Board order issued on March 19, 1993 by the Montana Board of Health

and Environmental Sciences approving amendments to the Lincoln County Air Pollution Control Program.

(E) Letter dated February 4, 1993, from Kendra J. Lind, Lincoln County Department of Environmental Health, to Gretchen Bennitt, Air Quality Bureau, Montana Department of Health and Environmental Sciences, which explains the local adoption process and effective date of amendments to the Lincoln County Air Quality Control Program regulations.

(F) Lincoln County Board of Commissioners Resolution No. 276, signed December, 23, 1992, and Libby City Council Ordinance No. 1470, signed February 1, 1993, adopting amendments to the Lincoln County Air Quality Control Program regulations 1 through 7.

(ii) Additional material.

(A) Montana Department of Health and Environmental Sciences Air Quality Permit #2627–M, with a final modification date of July 25, 1991, for Stimson Lumber Company (formerly Champion International Corporation), Libby Facility.

(B) Montana Smoke Management Plan, effective April 28, 1988, which addresses prescribed burning requirements.

(C) Federal tailpipe standards, which provide an ongoing benefit due to fleet turnover.

[FR Doc. 94–21312 Filed 8–29–94; 8:45 am]
BILLING CODE 6560–50–P

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40 CFR Part 80

[FRL-5061-5]

Public Document on Reformulated and Conventional Gasoline

AGENCY: Environmental Protection Agency.

ACTION: Notice of Availability.

SUMMARY: On February 16, 1994, the final rule establishing the requirements for reformulated gasoline (RFG), and the anti-dumping provisions for conventional gasoline, was published in the **Federal Register** at 59 FR 7716. In response to this final rule, the Environmental Protection Agency (EPA) received numerous questions regarding the Agency's plans for implementing and assuring compliance with the RFG and anti-dumping regulations. The Agency has prepared a document which responds to these questions, titled "Reformulated Gasoline and Anti-Dumping Question and Answers—July 1, 1994." This notice announces the availability of the RFG/anti-dumping regulations question and answer document, and provides instructions for accessing this document, and other RFG-related documents, on the Technology Transfer Network Bulletin Board System (TTNBBS). These instructions were widely distributed on July 1, 1994; however, we are publishing this notice for the benefit of interested persons not on our mailing list. Finally, it is our intention to make available on the TTNBBS, on a periodic basis, responses to any additional questions received by the Agency.

ADDRESSES: The RFG/anti-dumping regulations question and answer document is also available in public docket A–92–12 at the EPA Air Docket (6102), room M–1500, 401 M Street SW., Washington, DC 20460. The docket may be inspected from 8 a.m. until 4 p.m. Monday through Friday. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Persons with general questions about the question and answer document should contact Ms. Marilyn Bennett at (202) 233–9006, or Ms. Whitney Trulove-Cranor at (202) 233–9036, Field Operations and Support Division (6406J), Office of Mobile Sources, 401 M Street SW., Washington, DC 20460. Questions on enforcement of the RFG and anti-dumping regulations should be directed to Mr. George Lawrence at (202) 233–9307, Air Enforcement Division, Office of Regulatory Enforcement, 401 M Street SW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. Directions to Access RFG Documents on the TTNBBS

Copies of the preamble to the December 15, 1993 final rule, the Final Regulatory Impact Analysis (RIA), the Responses to Comments on Enforcement Provisions (RCEP), the complex model, the simple model, the regulations for the reformulated and conventional gasoline rulemaking, the technical amendments to the December 15, 1993 final rule, the RFG/Anti-Dumping Question and Answer Document, the renewable oxygenate preamble to the final rule, the renewable oxygenate regulations, and the renewable oxygenate RIA are available on the OAQPS Technology Transfer Network Bulletin Board System (TTNBBS).

The TTNBBS can be accessed with a dial-in phone line and a high-speed modem (PH# 919–541–5742). The parity of your modem should be set to none, the data bits to 8, and the stop bits to 1. Either a 1200, 2400, 9600, or 14400 baud modem should be used. When first signing on, the user will be required to answer some basic informational questions for registration purposes. After completing the registration process, proceed through the following series of menus:

(T) GATEWAY TO TTN TECHNICAL AREAS (Bulletin Boards)
(M) OMS
(K) Rulemaking and Reporting
(3) Fuels
(9) Reformulated gasoline

A list of ZIP files will be shown, all of which are related to the reformulated gasoline rulemaking process. The six documents mentioned above will be in the form of a ZIP file and can be identified by the following titles: "PREAMBLE.ZIP" (RIA preamble); "RIAFINAL.ZIP" (final RIA); "ENFORCE.ZIP" (RCEP); "EPAFINAL.ZIP" (complex model); "MODFINAL.ZIP" (simple model); "REGFINAL.ZIP" (regulations); "DFRM.ZIP" (direct final rulemaking which provides technical amendments to the final rule); "ROXY-PRE.ZIP" (renewable oxygenates preamble); "ROXY-REG.ZIP" (regulations); "ROXY-RIA.ZIP" (RIA); and "RFGQ&A.ZIP" (RFG/Anti-Dumping Question and Answer Document). To download these files, type the instructions below and transfer according to the appropriate software on your computer:

<D>ownload, <P>rotocol, <E>xamine, <N>ew, <L>ist, or <H>elp Selection or <CR> to exit: D filename.zip

You will be given a list of transfer protocols from which you must choose one that matches with the terminal software on your own computer. Then go into your own software and tell it to receive the file using the same protocol. Programs and instructions for de-archiving compressed files can be found via <S>ystems Utilities from the top menu, under <A>rchivers/de-archivers.

Dated: August 22, 1994.

Mary D. Nichols,

Assistant Administrator for Air and Radiation.

[FR Doc. 94–21363 Filed 8–29–94; 8:45 am]
BILLING CODE 6560–50–P

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40 CFR Part 300

[FRL–5062–2]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List Update

AGENCY: Environmental Protection Agency.

ACTION: Notice of Deletion of the Wide Beach Development site from the National Priorities List (NPL).

SUMMARY: The Environmental Protection Agency (EPA), Region II, announces the deletion of the Wide Beach Development site from the NPL. The NPL is Appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended. EPA and the State of New York have determined that all appropriate Hazardous Substance Response Trust Fund (Fund)-financed responses under CERCLA have been implemented and that no further cleanup by responsible parties is appropriate. Moreover, EPA and the State of New York have determined that remedial actions conducted at the site to date have been protective of public health, welfare, and the environment.

EFFECTIVE DATE: August 30, 1994.

FOR FURTHER INFORMATION CONTACT: Herbert H. King, Remedial Project Manager, U.S. Environmental Protection Agency, Region II, 26 Federal Plaza, Room 29–102, New York, NY 10278, (212) 264–1129.

SUPPLEMENTARY INFORMATION: The site to be deleted from the NPL is: Wide Beach Development site, Brant, New York.

The closing date for comments on the Notice of Intent to Delete was April 30, 1994. EPA received two comment letters. One commentor suggested that deleting the site from the NPL at this time is premature, because he believes that an on-site wetland was not properly restored and because the owner of the restored wetland has cut down some trees and shrubs located on the wetland. The commentor also suggested that the site not be deleted from the NPL since a number of contractual claims have not been resolved with the remedial action contractor. The second commentor expressed concern about the possible instability of the treated soil that was used as fill on a portion of her property. This commentor also expressed concern about possible problems disposing of the treated soil, in the event that a home were to be built on her property. EPA's response to the first commentor is that the design of the wetlands restoration was performed by an experienced landscape architect and biologist and that the restored wetland is the functional equivalent of the original wetland. EPA also noted that, because of its small size, this wetland is not covered by New York State wetland regulations; and since it is an isolated wetland and of limited size, disturbances of up to one acre do not require a federal permit. Therefore, the land owner's removal of trees and shrubs from the restored wetland is not in violation of state or federal wetland regulations. In addition, EPA indicated that, since the unresolved claims are contractual issues, they are not relevant to deleting the site from the NPL. To the second commentor, EPA noted that the treated soil has been stable since 1991, and that, since the treated soil is nonhazardous, it could be disposed of in the same manner as any other excavated, nonhazardous soils.

EPA identifies sites which appear to present a significant risk to public health, welfare, or the environment and it maintains the NPL as the list of those sites. Sites on the NPL may be the subject of Fund-financed remedial actions. Any site deleted from the NPL remains eligible for Fund-financed remedial actions in the unlikely event that conditions at the site warrant such action. Section 300.425 (e)(3) of the NCP states that Fund-financed actions may be taken at sites deleted from the NPL. Deletion of a site from the NPL does not affect responsible party liability or impede EPA's efforts to recover costs associated with response efforts.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

1. The authority citation for part 300 continues to read as follows:

Authority: 42 U.S.C. 9601–9657; 33 U.S.C. 1321 (c)(2); E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp.: p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp.: p.193.

Appendix B [Amended]

2. Table 1 of Appendix B to part 300 is amended by removing the Wide Beach Development site, Brant, New York.

Dated: August 17, 1994.

William J. Muszynski,

Deputy Regional Administrator.

[FR Doc. 94–21370 Filed 8–29–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 124

RIN 0905–AE06

Medical Facility Construction and Modernization; Requirements for Uncompensated Services for Persons Unable to Pay

AGENCY: Public Health Service, DHHS.

ACTION: Final rule.

SUMMARY: The rules below revise the rules currently governing how certain health care facilities, assisted under Titles VI and XVI of the Public Health Service Act, fulfill the assurance given in their applications for assistance that they would provide a reasonable volume of services to persons unable to pay for such services. The revisions below amend the rules to permit facilities that provide substantial free or below cost medical services but nonetheless cannot receive credit for such services under current requirements with an alternative method of compliance that will enable them to fulfill their uncompensated services obligations.

DATES: This rule is effective on August 30, 1994.

FOR FURTHER INFORMATION CONTACT: Mr. Eulas Dortch, 301–443–5656.

SUPPLEMENTARY INFORMATION: On November 4, 1993, the Secretary of Health and Human Services published a Notice of Proposed Rulemaking (NPRM) proposing to revise the rules governing what is popularly known as the Hill-Burton uncompensated services program. 58 FR 58828. Health care facilities covered by the program received construction assistance under two titles of the Public Health Service Act, Title VI (the "Hill-Burton Act", 42 U.S.C. 291, *et seq.*) and Title XVI (42 U.S.C. 300q, *et seq.*). Under both titles, facilities receiving construction assistance have been required, as a condition of receiving the construction assistance, to provide an assurance that "there will be available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor * * *." 42 U.S.C. 291c(e)(2). See also 42 U.S.C. 300s-1(b)(1)(K)(ii). This assurance is known as the "uncompensated services assurance."

Background of the Regulations

The groundwork of the present uncompensated services compliance requirements was laid by

comprehensive regulations that were issued in 1979. 44 FR 29372 (May 18, 1979). The 1979 regulations established numerous compliance requirements for uncompensated services programs. These included requirements for a minimum level of uncompensated services to be provided by facilities, an annual compliance level (ACL) of uncompensated services to be provided, make-up of any deficit in meeting the ACL, national eligibility criteria for determining who is unable to pay, notice requirements, requirements regarding the timing and documentation of eligibility determinations, reporting and recordkeeping requirements, and so on.

When experience with the 1979 regulations showed that they created substantial compliance problems for a number of public facilities, which were amassing large deficits despite serving large numbers of indigent patients on a free or below cost basis, the regulations were amended. A compliance alternative for public facilities, which is codified at 42 CFR 124.513, was created. 51 FR 33208 (Sept. 18, 1986). The public facility compliance alternative provides that a publicly owned and operated facility or quasi-public facility may be certified if it provides health services to eligible persons under a program of discounted health services and either received for the past three fiscal years at least 10 percent of its total operating revenue from state and/or local sources to cover operating deficits attributable to the provision of discounted health services, or provided in those fiscal years uncompensated services or free or discounted health services in an amount equal to or greater than twice the facility's annual compliance level. The facility must comply with separate reporting and recordkeeping requirements and is required only to comply with the requirements relating to certified facilities. A facility may make up previously assessed deficits by showing that it met the conditions for certification in the deficit period; a Title VI facility may also make up a previously assessed deficit by remaining certified after its original period of obligation for a period equal to the deficit period, while a Title XVI facility that cannot show that it met the conditions of certification in the deficit period must make up any remaining deficit whenever its certification is withdrawn. A facility with an unassessed deficit may submit an independent certified audit to establish that no, or a lesser, deficit exists.

In 1987, the Secretary again revised the 1979 regulations. 52 FR 46022 (Dec. 3, 1987). As pertinent here, an additional compliance alternative for facilities with annual obligations of $10,000 or less was created. See § 124.514. This alternative was adopted to bring the administrative costs of compliance for such facilities more into line with the actual level of uncompensated services available, with the requirements applicable under § 124.514 resembling those applicable under the public facility compliance alternative.

Proposed Rules

In the NPRM, the Secretary proposed an additional compliance alternative designed to address the compliance problems of another class of facilities whose operational characteristics have created intractable compliance problems, but which cannot qualify for the existing compliance alternatives. Many of these facilities provide substantial amounts of free or below cost services, generally because they were created to provide services at no or a nominal charge to all persons, or they serve an indigent population that is entirely covered by third-party programs such as Medicaid. These facilities, which are generally private, nonprofit organizations, include facilities such as sheltered workshops, crippled children rehabilitation facilities, cerebral palsy centers, chronic disease hospitals, Goodwill Centers, facilities for the blind, mental health centers, and Easter Seal Centers. Based on experience monitoring such facilities' compliance with the uncompensated services regulations since 1979, the Department determined that many such facilities have accumulated large uncompensated services deficits, typically because their policies of not charging or of serving populations covered under governmental indigent care programs preclude receiving credit under the uncompensated services regulations for the free and below cost care they in fact provide.

The Department identified 180 private, nonprofit outpatient, rehabilitation, and community mental health center facilities with outstanding uncompensated services obligations which were likely to have provided a large volume of free or below cost care while receiving little or no uncompensated services credit. A survey of 28 of these confirmed that there are a number of facilities for which compliance with the uncompensated services requirements is difficult or impossible, given their charging policies, legal requirements applicable to their operations, characteristics of their patient populations, or some combination of these factors, but which clearly provide health services without regard to ability to pay.

Accordingly, the Secretary proposed to adopt a compliance alternative for private, nonprofit facilities which provide a substantial amount of services without regard to ability to pay, but which find it difficult, if not impossible, to comply with the present uncompensated services requirements. The proposed compliance alternative was substantially similar to the public facility compliance alternative with respect to requirements for reporting, recordkeeping, and the make-up of deficits. However, the eligibility criteria differed somewhat. Under the proposed rule, a facility could qualify for the compliance alternative if it was a private, nonprofit entity falling into one of two categories: either (1) it received no monies directly from patients with incomes up to twice the poverty level (exclusive of certain deductible and coinsurance amounts and other required collections), or (2) it received for the three most recent fiscal years at least 10 percent of its non-Medicaid and non-Medicare operating revenue from philanthropic sources to cover operating deficits and either provided services under a "program of discounted health services" or provided all services to all persons at no or a nominal charge (exclusive of certain deductible and coinsurance amounts and other required collections). With respect to the first category, the NPRM stated that in the Department's view those facilities that collect no monies from patients with incomes up to twice the poverty level are meeting the statute's objectives. Similarly, with respect to the second category, the proposed percentage of private philanthropic support was considered to be a proxy for tax support in the public facility context, as such monies are generally contributed to fund services which are deemed essential or worthwhile, but which are not self-supporting. The "program of discounted health services" criterion is analogous to a similar criterion in the public facility compliance alternative, and reflects a recognition that many such facilities have in place a mechanism for determining eligibility for such services by screening for ability to pay. The rationale for the other criterion is self-evident: Clearly, facilities that provide all services at no or a nominal charge are adequately serving those in their patient population who are unable to pay. The NPRM also solicited comment on whether the compliance alternative should be

expanded to cover public facilities that do not qualify for the public facility compliance alternative but whose operational characteristics are similar to the private, nonprofit entities the alternative would cover.

Public Comment and the Department's Responses

The Department received 23 comments on the proposed rules, principally from rehabilitation and other facilities and provider associations. While most of the comments received were in favor of the proposed compliance alternative in principle, many suggested specific changes to the proposed policies. The comments and the Department's responses thereto are summarized below.

1. Criteria for Certification.

a. Inclusion of Public Facilities

A number of commenters recommended that the criteria for certification be changed to permit the inclusion of public facilities that otherwise meet the criteria for certification. They argued that there is operationally no difference between such facilities and non-profit facilities that meet the criteria, and that it is unreasonable to penalize public facilities just because they are public. The Department agrees with these comments and has changed the rules accordingly, by eliminating proposed § 124.516(b)(1), which would have restricted the compliance alternative to private, nonprofit facilities.

b. No Monies Received From the Indigent

Proposed § 124.516(b)(2) would have established, as one alternative criterion for certification, that a facility received no monies directly from persons with incomes up to twice the poverty level, exclusive of amounts charged or received for purposes of obtaining reimbursement under third party programs. Several commenters urged that this criterion be revised to permit receipt of funds from such persons, on the grounds that it is unrealistic to expect a facility to receive *no* money from such persons. It was suggested that the criterion be revised to permit receipt of funds up to some amount, such as 10 percent of operating revenues. The Department has not accepted this suggestion. This criterion was intended to accommodate those exceptional facilities which routinely provide all services at no charge to persons unable to pay or which entirely serve populations ineligible for uncompensated services and are thus unable to comply with the regulations. Facilities that collect monies from patients with incomes below twice the poverty level do not come within the intent of this criterion. It should be noted, however, that such facilities may nonetheless be able to qualify for the compliance alternative under a different criterion of the regulation, if they have a "program of discounted health services" and receive the requisite amount of philanthropy. See § 124.516(b)(2) below.

Another suggestion made with respect to this criterion was that amounts collected from patients as part of their Medicaid "spenddown" be considered to be included under the exclusionary language of this section, so that collection of such monies by a facility would not render it ineligible under this criterion. This suggestion has likewise not been accepted. Spenddown amounts are clearly not within the scope of the exclusionary language as written, as Medicaid eligibility does not exist until the patient has spent down the requisite amount, and therefore they are not amounts charged that are reimbursable. Nor do we think the language should be revised to permit inclusion of spenddown amounts in the amounts permitted to be charged or claimed. As stated above, this criterion is intended to cover a narrow class of facilities—ones which can be considered to be meeting their Hill-Burton obligation because they are in fact not receiving monies directly from any patients who would otherwise be eligible for Hill-Burton uncompensated services. Permitting collection of spenddown amounts would thus not be consistent with the intended scope of this criterion.

This criterion has been revised, however, to require that the facility demonstrate that it met the criterion for the preceding three fiscal years. This revision brings this criterion into line with the 10 percent philanthropy criterion of § 124.516(b)(2), which also requires a demonstration of compliance over the preceding three years. The purpose of the three-year demonstration in both cases is to give the Secretary a basis for the conclusion that a facility applying for certification in fact comes within the intended scope of the compliance alternative because of its characteristics and problems, and that certification is not made based on what may be a one-time aberration in the facility's circumstances. See § 124.516(b)(1) below.

Another commenter suggested that, in view of the difficulty many nursing homes have in finding individuals who are eligible for uncompensated services and not also eligible for Medicaid, the Department create a new eligibility category for persons in nursing homes with incomes up to four times the poverty level. In fact, the Secretary is considering such a change to the regulations; an NPRM proposing to establish a new "Category C," consisting of persons with incomes up to three times the poverty level was recently published. 59 FR 15693 (April 4, 1994). It should be noted that, should this latter policy subsequently be adopted, the Secretary would expect to revise § 124.516(b)(1) below to be consistent with the revision in the underlying regulations.

c. Definition of "Philanthropy"

Consistent with the elimination of the restriction of the compliance alternative to private facilities, the Department has also broadened the examples of "philanthropy" in the new § 124.516(b)(2)(i). As revised, the term "philanthropy" includes state and/or local funding, as it is anticipated that most philanthropic funding for public facilities will originate from such sources.

The term "philanthropy" has also been clarified by the addition of the phrase "to cover operating deficits attributable to the provision of discounted services." The added words, among other things, make clear that philanthropic state or local funding within the scope of this section is different than state or local funds received under entitlement programs, which have long been considered not to be "uncompensated services"; see § 124.505(a). The additional language imposes a similar restriction on other forms of philanthropy.

Several commenters suggested that the term "philanthropy" be further revised to include interest earned on donated funds. However, since it is the Department's view that interest on donated funds is clearly from a "philanthropic source," further clarification of the regulation in this respect is not needed.

d. Program of Discounted Services

One provider group opposed the eligibility criterion permitting certification where a facility has a "program of discounted services." The group argued that this provision would create a problem under Medicaid and Medicare, the rules of which prohibit those programs from subsidizing other patients. The Department does not believe that this is a problem, since the discounts made to patients under a facility's discounted health services

program are not required to be reflected in charges to those programs. Certainly, this has not proved to be a problem with facilities operating under the general compliance requirements or with facilities certified under the public facility compliance alternative, which contains the same eligibility criterion.

The definition of "program of discounted health services" has been revised, however, by the addition of language making clear that charges may be made under such a program for the purpose of obtaining third party reimbursements. This policy was discussed in the preamble to the proposed rule, but was omitted from the proposed rule itself. The change simply makes the policy of this section consistent with the policy throughout the remainder of the subpart that third party collections are to be encouraged. See § 124.505(a).

e. No or Nominal Charge Policies

This section has likewise been revised by the addition of the language discussed in the preceding paragraph. One comment questioned the criterion set out in the proposed rules pertaining to making "all services of the facility available to all persons at no or a nominal charge." It expressed the concern that a hospital could qualify for the compliance alternative under this criterion simply by designating some narrow group of services, then making them available for free or at a nominal charge, while continuing to charge everyone fully for the facility's other services. We do not share the commenter's concern, as the rule below expressly states that, in order to come within this criterion, the facility must "make[ ] all services of the facility available to all persons * * *" See § 124.516(b)(2)(ii)(B) below.

f. Other Eligibility Criteria

Other proposals for eligibility criteria were received. Several commenters suggested that a facility's Medicaid census be a basis for eligibility; these commenters suggested that facilities with a 70 percent or greater Medicaid census be eligible for the compliance alternative. One commenter suggested that long-term care facilities with characteristics "similar" to the proposed eligibility criteria likewise be considered to be eligible for the compliance alternative.

The Department is not persuaded that it should create a special eligibility criterion based on a facility's Medicaid/Medicare census. Clearly, those facilities that serve large numbers of Medicaid or Medicare recipients are not precluded from qualifying under one of the criteria below, if they in fact meet those criteria. Indeed, we do not think it would be consistent with the theory underlying the compliance alternative to craft such an eligibility criterion. The theory of the compliance alternative is that the facilities who come within it need the alternative because compliance with the general compliance standards is difficult, if not impossible, for them because of their operational characteristics, even though they are clearly providing free or below cost services to "persons unable to pay." However, compliance with the general compliance standards is not impossible for a facility with a 70 percent Medicaid/Medicare census which charges the remaining 30 percent of its patient population. After all, if none of the remaining 30 percent of the facility's patient population meets the eligibility criteria of § 124.505, the facility will qualify for the compliance alternative under § 124.516(b)(1) below. Thus, it must be assumed that the intent of the proposed revision would be to permit facilities to qualify for the compliance alternative even though they charge patients who meet the Hill-Burton eligibility criteria and who thus could be provided uncompensated services.

With respect to the comment regarding long-term care facilities, the Department has not created a special criterion for such facilities. If such facilities meet the eligibility criteria below, they may be certified under the new compliance alternative. We note, moreover, that the proposed change in eligibility criteria for nursing homes may well relieve some of the particular difficulties of nursing homes in complying with the general compliance standards.

2. Documentation

A number of comments expressed support for minimizing the reporting and recordkeeping required of qualifying facilities under the proposed compliance alternative. One hospital, however, opposed the proposed rules on the grounds that they simply created an additional layer of reporting and recordkeeping requirements, stating that the existing requirements work well. It should be emphasized that the compliance alternative is not meant to create an additional set of requirements for facilities already complying with the general compliance requirements at §§ 124.501–124.512; rather, the compliance alternative below is designed to relieve facilities which qualify for it from the burden of complying with the general compliance requirements. Consistent with this approach, the reporting and recordkeeping required for qualifying facilities is different from that required of most facilities and should generally be considerably less than that under the general compliance standards. In any event, a facility that is not certified under the compliance alternative does not have to comply with the reporting and recordkeeping requirements applicable to those facilities which are certified; concommitantly, a facility that is certified under the compliance alternative is not required to comply with reporting and recordkeeping requirements other than those that apply to certified facilities. A facility always has the option of continuing to comply with the general compliance requirements; it can thus ignore the compliance alternative completely if it decides that compliance with the general compliance requirements makes more sense for it. Thus, we do not think that this particular concern is justified.

A couple of commenters pointed out that the proposed means of demonstrating that a facility meets the eligibility criteria—through audited financial statements—would not necessarily suffice, depending on the criterion involved. They pointed out that, for example, audited financial statements do not necessarily set forth philanthropic sources in the level of detail required, or establish a facility's charging policies. They suggested that the rule be amended to require facilities to contract for such information as part of their audits. The Department agrees with the observation made about the limitations of audited financial statements, but does not agree with the remedy proposed. Rather, it is our view that documentation sufficient to establish sources of philanthropy, charging practices and so on can be provided by other means, and we are reluctant to put facilities to the added expense of contracting for audit services that they would not otherwise need. Thus, § 124.516(c)(1) below has been revised to add a requirement for "other documents" to cover the concern raised by the commenters. The Department will issue program instructions clarifying what other documents may be required in specific instances.

3. Deficits

One commenter suggested that the proposed rules be revised to permit facilities to treat deficits resulting from Medicaid underpayments as justifiable deficits. However, we are not accepting this comment, as it is not pertinent to the compliance alternative. The rules below do not distinguish between types of deficits for purposes of deficit make-up under the alternative, unlike the

general compliance requirements, which do draw such a distinction. Compare § 124.516(d)(2) below with § 124.503(b). Thus, under the compliance alternative, a certified facility with a noncompliance deficit may make up the deficit in precisely the same manner as a certified facility with a justifiable deficit.

4. Other Comments

Several comments questioned whether vocational services could be counted as uncompensated services under the compliance alternative; the facilities concerned stated that they have difficulty meeting the ACL since they do not receive credit for vocational services they provide. The compliance alternative below should relieve this problem for facilities that are certified, however. Certified facilities will not have to provide a set amount of uncompensated services, unlike facilities operating under the general compliance requirements. Thus, so long as certified facilities provide some medical services and otherwise remain in compliance with the requirements for certification, they will be considered to be in compliance with their uncompensated services assurance.

In view of the fact that the rules below relieve restrictions on facilities that apply and are certified for the compliance alternative and impose no additional duties or obligations on other facilities, delay in the effective date of these rules is not required under 5 U.S.C. 553. For the same reasons, the Secretary hereby finds that good cause exists for not delaying the effective date of the rules below. The rules are accordingly effective upon publication.

Regulatory Flexibility Act and Executive Order 12866

The rule below would generally maintain the existing procedural and reporting requirements for the majority of obligated facilities, but significantly lessen them for certain private, nonprofit or public facilities. The Department has determined that the impact would not approach the annual $100 million threshold for major economic consequences as defined in Executive Order 12866. Therefore, a regulatory impact analysis is not required.

Consistent with the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Secretary certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act of 1980

This final rule contains information collections which have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, and assigned control #0915–0171.

The underlying purpose of this rule is to decrease recordkeeping, reporting, and notification burden for the charitable facilities. Facilities certified under the charitable facility compliance alternative will no longer be required to maintain extensive records on uncompensated services (124.510(a)), but instead will have to maintain only records which document its eligibility for the compliance alternative (124.510(b)). We believe this recordkeeping requirement imposes no additional burden because these documents are ordinarily retained by facilities. This change is expected to reduce the recordkeeping burden by 75 hours per facility per year.

Similarly, reporting burden will be reduced. Charitable facilities will be required to apply once for the certification (124.516(c)), and thereafter will need only to certify their continued eligibility annually (124.509(b)). Currently, facilities in deficit status, which include most of the charitable facilities, must file a report each year which documents the amount of uncompensated care provided (124.509(a)). This change in reporting requirements is expected to reduce the reporting burden by 6 hours per facility in the first year, and by 13.5 hours per facility in subsequent years.

Finally, notification/disclosure burden will be eliminated, because the facilities will no longer be required to: (1) Publish a notice each year of the availability of uncompensated services (124.504(a)); (2) provide individual written notices to each person seeking service in the facility (124.504(c)); or (3) provide a determination of eligibility to each person applying for uncompensated services (124.507). These changes are expected to reduce the notification burden by 380 hours per facility per year.

All sections of the regulations that contain reporting, recordkeeping, or notification/disclosure requirements have been approved by OMB under the Paperwork Reduction Act (OMB) #0915–0077 and #0915–0171. The title, description, and respondent description of the information collections are shown below with an estimate of the annual reporting and recordkeeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The addition of the requirement for "other documents" in § 124.516(c)(1) will not affect the burden because the other documents are expected to be readily available materials.

The estimate of 150 applicants was based on a review, prior to development of the NPRM, of data on the kinds of facilities expected to qualify for the alternative. A recent re-review of the list of facilities indicated that 30 of the facilities have completed their obligations. With the addition of public facilities in the qualifying criteria, we expect approximately 30 additional facilities to apply for certification.

Title: Charitable Facility Compliance Alternative (42 CFR part 124 subpart F).

Description: Information will be collected from facilities requesting certification under the compliance alternative for the purpose of determining whether the required criteria for qualification have been met.

Description of Respondents: Public and private non-profit institutions.

ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

Section	Activity	Annual number of respondents	Annual frequency	Average burden per response	Annual burden hours
124.516(c)	Procedures for certification[1]	150	1	6.0	900

[1] Approximately 150 facilities are expected to be certified under the proposed charitable facility compliance alternative in the first year. We expect no new applications in subsequent years; therefore, there will be no burden beginning in year 2.

We received no public comments on the estimated public reporting burden and it remains the same as that contained in the proposed rule.

List of Subjects in 42 CFR Part 124

Grant programs—Health, Health facilities, Loan programs—Health, Low income persons, Reporting and recordkeeping requirements.

Dated: July 1, 1994.

Philp R. Lee,

Assistant Secretary for Health.

Approved: August 11, 1994.

Donna E. Shalala,

Secretary.

For reasons set out in the preamble, part 124, subpart F, of title 42 of the Code of Federal Regulations is amended to read as follows:

PART 124—[AMENDED]

Subpart F—Reasonable Volume of Uncompensated Services to Persons Unable to Pay

1. The authority citation for 42 CFR part 124, subpart F, continues to read as follows:

Authority: 42 U.S.C. 216; 42 U.S.C. 300s(3).

2. Section 124.502 is amended by revising the first sentence of paragraph (m)(1) and revising paragraph (m)(2) to read as follows:

§ 124.502 Definitions.

* * * * *

(m) * * *

(1) For facilities other than those certified under § 124.513, § 124.514, § 124.515, or § 124.516, health services that are made available to persons unable to pay for them without charge or at a charge which is less than the allowable credit for those services.

* * *

(2) For facilities certified under § 124.513, § 124.514, § 124.515, or § 124.516, services as defined in paragraph (m)(1) of this section and services that are made available to persons unable to pay for them under programs described by the documentation provided under § 124.513(c)(2), § 124.514(c)(2), or § 124.516(c)(2), as applicable, or pursuant to the terms of the applicable grant or agreement as provided in § 124.515. Except as provided in § 124.516, excluded are services reimbursed by Medicare, Medicaid, or other third party programs, including services for which reimbursement was provided as payment in full, and services provided more than 96 hours following notification to the facility by a peer review organization that it disapproved the services under section 1155(a)(1) or section 1154(a)(1) of the Social Security Act.

3. Section 124.508 is amended by revising the heading and introductory text of paragraph (a) to read as follows:

§ 124.508 Cessation of uncompensated services.

(a) *Facilities not certified under § 124.513, § 124.514, § 124.515 or § 124.516.* Where a facility, other than a facility certified under § 124.513, § 124.514, § 124.515, or § 124.516, has maintained the records required by § 124.510(a) and determines based thereon that it has met its annual compliance level for the fiscal year or the appropriate level for the period specified in its allocation plan, it may, for the remainder of that year or period:

* * * * *

4. Section 124.509 is amended by revising the heading of paragraph (a) and by revising the heading and introductory text of paragraph (b) to read as follows:

§ 124.509 Reporting requirements.

(a) *Facilities not certified under § 124.513, § 124.514, § 124.515, or § 124.516.* * * *

* * * * *

(b) *Facilities certified under § 124.513 or § 124.516.* A facility certified under § 124.513 or § 124.516 shall comply with paragraph (a)(3) of this section and shall submit within 90 days after the close of its fiscal year, as appropriate:

* * * * *

5. Section 124.510 is amended by revising the heading of paragraph (a) and by revising the heading and the first sentence of paragraph (b) to read as follows:

§ 124.510 Record maintenance requirements.

(a) *Facilities not certified under § 124.513, § 124.514, § 124.515, or § 124.516.* * * *

* * * * *

(b) *Facilities certified under § 124.513, § 124.514, or § 124.516.* A facility certified under § 124.513, § 124.514, or § 124.516 shall maintain, make available for public inspection consistent with personal privacy, and provide to the Secretary on request, any records necessary to document its compliance with the applicable requirements of this subpart in any fiscal year, including those documents submitted to the Secretary under § 124.513(c), § 124.514(c), or § 124.516(c). * * *

* * * * *

6. Section 124.511 is amended by revising the first sentence of paragraph (a)(3) and by revising paragraph (b)(1)(iii)(C) to read as follows:

§ 124.511 Investigation and determination of compliance.

(a) * * *

(3) When the Secretary investigates a facility, the facility, including a facility certified under § 124.513, § 124.514, § 124.515, or § 124.516, shall provide to the Secretary on request any documents, records and other information concerning its operation that relate to the requirements of this subpart. * * *

* * * * *

(b) * * *

(1) * * *

(iii) * * *

(C) The facility had procedures in place that complied with the requirements of §§ 124.504(c), 124.505, 124.507, 124.509, 124.510, 124.513(b)(2), 124.514(b)(2), 124.515, and 124.516 (b)(1) or (b)(2), as applicable, and systematically correctly followed such procedures.

* * * * *

7. Section 124.512 is amended by revising the introductory text of paragraph (b) and by revising paragraph (c)(1) to read as follows:

§ 124.512 Enforcement.

* * * * *

(b) A facility, including a facility certified under § 124.513, § 124.514, or § 124.516, that has denied uncompensated services to any person because it failed to comply with the requirements of this subpart will not be in compliance with its assurance until it takes whatever steps are necessary to remedy fully the noncompliance, including:

* * * * *

(c) * * *

(1) Have a system for providing notice to eligible persons as required by § 124.504(c), § 124.513(b)(2), § 124.514(b)(2), or § 124.516(b)(2)(ii)(A), as applicable;

* * * * *

8. In subpart F, § 124.516 is redesignated as § 124.517.

9. A new § 124.516 is added to subpart F, to read as follows:

§ 124.516 Charitable facility compliance alternative.

(a) *Effect of certification.* The Secretary may certify a facility which meets the requirements of paragraphs (b) and (c) of this section as a "charitable facility." A facility which is so certified is not required to comply with this subpart except as otherwise herein provided.

(b) *Criteria for qualification.* A facility may qualify for certification under this

section if it meets the criteria of either paragraph (b)(1) or paragraph (b)(2) of this section:

(1) It received, for the three most recent fiscal years, no monies directly from patients with incomes up to double the current poverty line issued by the Secretary pursuant to 42 U.S.C. 9902, exclusive of amounts charged or received for purposes of claiming reimbursement under third party insurance or governmental programs, such as Medicaid or Medicare deductible or coinsurance amounts; or

(2)(i) It received, for the three most recent fiscal years, at least 10 percent of its total operating revenue (net patient revenue plus other operating revenue, exclusive of any amounts received, or if not received, claimed, as reimbursement under titles XVIII and XIX of the Social Security Act) from philanthropic sources to cover operating deficits attributable to the provision of discounted services. Philanthropic sources include private trusts, foundations, churches, charitable organizations, state and/or local funding, and individual donors; and either—

(ii) (A) Provides health services without charge or at a substantially reduced rate (exclusive of amounts charged or received for purposes of claiming reimbursement under third party insurance or governmental programs, such as Medicaid or Medicare deductible or coinsurance amounts) to persons who are determined by the facility to qualify therefor under a program of discounted health services. A "program of discounted health services" must provide for financial and other objective eligibility criteria and procedures, including notice prior to nonemergency service, that assure effective opportunity for all persons to apply for and obtain a determination of eligibility for such services including a determination prior to service where requested; or

(B) Makes all services of the facility available to all persons at no more than a nominal charge, exclusive of amounts charged or received for purposes of claiming reimbursement under third party insurance or governmental programs, such as Medicaid or Medicare deductible or coinsurance amounts.

(c) *Procedures for certification.* To be certified under this section, a facility must submit to the Secretary, in addition to other materials that the Secretary may from time to time require, copies of the following:

(1) Audited financial statements for the three most recent fiscal years or other documents prescribed by the Secretary, sufficient to show that the facility meets the criteria of paragraph (b)(1) or (b)(2) of this section.

(2)(i) Where the facility claims qualification under paragraph (b)(2)(ii)(A) of this section, a complete description, and documentation where requested, of its program of discounted health services, including charging and collection policies of the facility, and eligibility criteria and notice and determination procedures used under its program(s) of discounted health services.

(ii) Where the facility claims qualification under paragraph (b)(1) or paragraph (b)(2)(ii)(B) of this section, a complete description, and documentation where requested, of its admission, charging, and collection policies.

(d) *Period of effectiveness.* (1) A certification by the Secretary under this section remains in effect until withdrawn. The Secretary may disallow credit under this subpart when the Secretary determines that there has been a material change in any factor upon which certification was based or substantial noncompliance with this subpart. The Secretary may withdraw certification where the change or noncompliance has not been in the Secretary's judgment adequately remedied or otherwise continues.

(2) *Deficits.*—(i) *Title VI-assisted facilities with assessed deficits.* Where a facility assisted under title VI of the Act has been assessed as having a deficit under § 124.503(b) that has not been made up prior to certification under this section, the facility may make up that deficit by either—

(A) Demonstrating to the Secretary's satisfaction that it met the applicable requirements of paragraph (b) of this section for each year in which a deficit was assessed; or

(B) Providing an additional period of service under this section on the basis of one year (or portion of a year) of certification for each year (or portion of a year) of deficit assessed. The period of obligation applicable to the facility under § 124.501(b) shall be extended until the deficit is made up in accordance with the preceding sentence.

(ii) Where any period of compliance under this subpart of a facility assisted under title VI of the Act has not been assessed, the facility will be presumed to have no allowable credit for such period. The facility may either—

(A) Make up such deficit in accordance with paragraph (d)(2)(i) of this section; or

(B) Submit an independent certified audit, conducted in accordance with procedures specified by the Secretary, of the facility's records maintained pursuant to § 124.510. If the audit establishes to the Secretary's satisfaction that no, or a lesser, deficit exists for the period in question, the facility will receive credit for the period so justified. Any deficit which the Secretary determines still remains must be made up in accordance with paragraph (d)(2)(i) of this section.

(iii) *Title XVI-assisted facilities.* (A) A facility assisted under title XVI of the Act which has an assessed deficit which was not made up prior to certification under this section shall make up that deficit in accordance with paragraph (d)(2)(i)(A) of this section. If it cannot make the showing required by that paragraph, it shall make up the deficit when its certification under this section is withdrawn.

(B) A facility assisted under title XVI of the Act whose compliance with this subpart has not been completely assessed will be presumed to have no allowable credit for the unassessed period. The facility may make up the deficit by—

(*1*) Following the procedure of paragraph (d)(2)(iii)(A) of this section; or

(*2*) Submitting an independent certified audit, conducted in accordance with procedures specified by the Secretary, of the facility's records maintained pursuant to § 124.510. If the audit establishes that no, or a lesser, deficit exists for the period in question, the facility will receive credit for the period so justified. Any deficit which the Secretary determines still remains must be made up in accordance with paragraph (d)(2)(iii)(A) of this section.

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FEDERAL MARITIME COMMISSION

46 CFR Part 501

Organization, Functions, and Authority Delegations: Administration Bureau, Director

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is expanding its delegation of authority to the Director, Bureau of Administration with respect to accounting systems and the collection of user fees charged for the Automated Tariff Filing and Information System.

EFFECTIVE DATE: August 30, 1994.

FOR FURTHER INFORMATION CONTACT: Joseph C. Polking, Secretary, Federal Maritime Commission, 800 N. Capitol